82-1327

No.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

WESTERN OIL AND GAS ASSOCIATION, *et al.*,
Petitioners,

v.

THE STATE OF CALIFORNIA, acting by and through Governor Edmond G. Brown, Jr., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED[1]

Whether the lower court erred in holding that the initial leasing stage of an Outer Continental Shelf (OCS) project "directly affect[s]" a state's coastal zone and must be preceded by a written determination that it can be conducted "to the maximum extent practicable, consistent with approved state management programs" pursuant to Section 307(c)(1) of the Coastal Zone Management Act, 16 U.S.C. § 1456(c)(1), because activities might be authorized at later stages of the project which could possibly affect the coastal zone?

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[1] Petitioners disagree with the Ninth Circuit's holding that environmental groups and local governments have standing to sue under Section 307(c)(1) of the CZMA. However, since petitioners do not challenge California's standing, they will not present a question in this petition concerning the standing of other parties. *See Watt* v. *Energy Action Educational Foundation*, 454 U.S. 151, 160 (1981).

PARTIES TO PROCEEDINGS BELOW

This litigation was instituted through separate, but virtually identical, complaints filed by the State of California, acting through Governor Brown, and five agencies of the State government and by the Natural Resources Defense Council, Inc., the Sierra Club, Friends of the Earth, Friends of the Sea Otter, and the Environmental Coalition on Lease Sale No. 53.

Plaintiffs sued James G. Watt, the Secretary of the Interior, as well as Edward Hastey and Robert Burford, both of whom hold positions within the Department of the Interior. Also named as defendants were the Department and its Bureau of Land Management.

Intervening as defendants and appearing as appellants in the Ninth Circuit were the Western Oil and Gas Association, a regional trade association, and twelve of its members, Amoco Production Company, Atlantic Richfield Company, Champlin Refining Co., Chevron U.S.A., Inc., Cities Service Co., Conoco Inc., Elf Aquitaine Oil & Gas Co., Exxon Corp., Getty Oil Co., Gulf Oil Corp., Phillips Petroleum Co., and Shell Oil Co.[2]

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[2] The parties joining in this petition are the Western Oil and Gas Association, Amoco Production Company, Atlantic Richfield Company, Champlin Refining Co., Conoco Inc., Elf Aquitaine Oil & Gas Co., Exxon Corp., Getty Oil Co., Gulf Oil Corp., Phillips Petroleum Co., and Shell Oil Co. Pursuant to Rule 28.1 of the Supreme Court Rules of the United States, the corporate parties name their parent companies, subsidiaries, and affiliates as follows:

Amoco Production Co.—Amoco Australia Ltd.; Amoco Canada Petroleum Co. Ltd.; Amoco Credit Corp.; Amoco Oil Holdings S. A.; Amoco (U.K.) Exploration Co.; Analog Devices Inc.; Cetus Corp.; Chicago Bank of Commerce; Cyprus Mines Corp.; Solarex Corp.; and Standard Oil Co. (Indiana).

Atlantic Richfield Co.—Alyeska Pipeline Serv. Co.; Badger Pipe Line Co.; Black Lake Pipe Line Co.; Chapin, Kieley &

Subsequently, various local governmental entities within California intervened as plaintiffs in the case commenced by the State: The Counties of Humboldt, Marin,

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Howe, Inc.; Colonial Pipe Line Co.; Cook Inlet Pipe Line Co.; Delaware Bay Transp. Co.; Dixie Pipe Line Co.; East Texas Salt Water Disposal Co.; Flower Street Ltd.; Gravity Adjustment, Inc.; Griffith Consumers Co.; Hardy Oil Co.; Hydrokem Performance Chem. Co.; Iricon Agency Ltd.; Kenai Pipe Line Co.; Lavan Petroleum Co.; Montoro, Empresa Para La Industria Quimica; Nihon Oxirane Co. Ltd.; Oil Shippers Serv., Inc.; Ontario Terminals, Inc.; Platte Pipe Line Co.; Sinclair Venezuelan Oil Co.; Tecumseh Pipe Line Co.; Texas-New Mexico Pipe Line Co.; and Trans Mountain Oil Pipe Line Co.

Champlin Refining Co.—Esperanza Pipeline Corp.; Rocky Mountain Energy Co.; Union Pacific Corp.; Union Pacific R.R. Co.; and Upland Indus. Corp.

Conoco, Inc.—E. I. du Pont de Nemours & Company; Big Sky of Montana Realty, Inc.; Calcasieu Chem. Corp.; Cit-Con Oil Corp.; Conch Intl. Methane Ltd.; Condea Chemie GmbH; Felix Oil Co.; Kettleman North Dome Assoc.; Long Beach Oil Dev. Co.; Maritime Protection A/S; Nippon Aluminum Alkyls, Ltd. (NAA); Nissan-Conoco Corp. (NCK); Oil Shippers Serv., Inc.; (OMW) Oberrheinische Mineraloelwerke GmbH; PASA Petroquimica Argentina, S.A.; Petrocokes, Ltd.; Petroleum Terminals, Inc.; Petroquimica Espanola, S.A. (PETRESA); Southern Facilities, Inc.; The Standard Shale Products Co.; T.A.L.; and Tidelands Royalty Trust.

Elf-Aquitaine Oil & Gas Co.—Azufres Nationale Mexicanos, S.A. de C.V.; Compania Exploradora del Istmo, S.A.; Cripple Creek Victor Gold Mining Co.; St. Laurens Harbor Storage Co.; and Societe National Elf Aquitaine.

Exxon Corp.—Exxon Pipeline Co.; Imperial Oil Ltd.; and Reliance Elec. Co.

Getty Oil Co.—Butte Pipe Line Co.; Cable Enterprises, Inc.; Canadian Reserve Oil and Gas Ltd.; Chase Terminal Co.; Chase Transp. Co.; Chemplex Co.; Chemplex Constr. Corp.; Chisholm Pipeline Co.; Crescent Petroleum Co.; Dieter Pohlmann & Co. GmbH; Entertainment and Sports Programming Network, Inc.; Gibson Holdings, Ltd.; Gibson Petroleum Ltd.; Halbouty Alaska Oil Co.; Iricon Agency Ltd.; MAGEC Finance Co.; Mitsubishi Oil Co., Ltd.; Northern Tier Pipeline Co.; Osage Pipe Line Co.; Seminole Pipeline Co.; Texas-New Mexico Pipe Line Co.; Texoma Pipe Line Co.; Tide Water Oil Co. (India) Ltd.; Wascana Pipe Line, Inc.; and Yong-Nam Chemical Co., Ltd.

Mendocino, Monterey, San Diego, San Francisco, San Luis Obispo, San Mateo, Santa Barbara, Santa Clara, Santa Cruz, and Sonoma; the Cities of Brisbane, Capito-

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Gulf Oil Corp.—Allied-General Nuclear Serv.; Bio Research Center Co., Ltd.; Colonial Pipeline Co.; Delaware Bay Transp. Co.; Dixie Pipeline Co.; Explorer Pipeline Co.; Laurel Pipe Line Co.; Mid-Valley Pipeline Co.; Midwest Carbide Corp.; Oil Shippers Serv., Inc.; Oklahoma Nitrogen Co.; Paloma Pipe Line Co.; Pembroke Capital Co.; Platte Pipe Line Co.; Rio Blanco Oil Shale Prshp.; Valley Pines Assoc.; and West Texas Gulf Pipe Line Co.

Phillips Petroleum Co.—Acurex Corp.; Aero Oil Co.; Alyeska Pipeline Serv. Co.; Arctic LNG Transp. Co.; Bruin Carbon Dioxide Sales Corp.; Calatrava, Empresa Para la Industria Petroquimica, S.A.; Canada Western Cordage Co. Ltd.; Canyon Reef Carriers, Inc.; Chisholm Pipeline Co.; Cochin Refineries Ltd.; Colonial Pipeline Co.; Compagnie Francaise du Carbon Black, S.A.; Dixie Pipeline Co.; Drisco, S. A. de C.V.; East Texas Salt Water Disposal Co.; Everglades Pipe Line Co.; Explorer Pipeline Co.; Heat Transfer Research, Inc.; Insurance and Reinsurance Brokers (Bermuda) Ltd.; Iranian Marine Intl. Oil Co.; Kaw Pipe Line Co.; Kenai LNG Corp.; Negromex, S.A.; Nordisk Philblack AB; Nordisk Kemi AB; Norland GmbH Fur Grundbesitz Und Industrieanlagen; Norpipe a.s; Norpipe Petroleum UK Ltd.; Norsea Gas A/S; Norsea Gas GmbH; Norsea Pipeline Ltd.; Oil Insurance Ltd.; Papago Chem., Inc.; Petrochim; Phillips Carbon Black Co. (Proprietary) Ltd.; Phillips Carbon Black Italiana S.p.A.; Phillips Carbon Black Ltd.; Phillips Gas Supply Corp.; Phillips-Imperial Petroleum Ltd.; Phillips Pacific Chem. Co.; Phillips Petroleum Singapore Chem. (Private) Ltd.; Philmac Oils Ltd.; Philmac Panama Inc.; Plasticos Vanguardia, S.A.; Polar LNG Shipping Corp.; Quimica Venoco C.A.; Renolit-Fertighaus GmbH; The Salk Institute Biotechnology/ Industrial Assoc., Inc.; Sevalco (Holdings) Ltd.; Sevalco Ltd.; Spodco Ltd.; Texas Offshore Port, Inc.; Transatlantic Reinsurance Co.; Trenwick Ltd.; Venezoil, C.A.; Western Desert Operating Petroleum Co.; and White River Shale Oil Corp.

Shell Oil Co.—Basin Pipe Line System; Bullenbay Marine Serv., N.V.; Business Dev. Corp. of North Carolina; Butte Pipe Line Co.; Capline System; Capwood Pipe Line System; Cortez Capital Corp.; Crown-Shell Baytown Feeder Line System; Curacao Oil Terminal, N.V.; Dixie Pipeline Co.; East Texas Salt Water Disposal Co.; Explorer Pipeline Co.; First Harlem Secur-

la, Carmel-by-the-Sea, Los Angeles, Morro Bay, Pismo Beach, San Francisco, San Luis Obispo, Santa Barbara, Santa Cruz, Santa Monica, and Seaside; and the Association of the Monterey Bay Area governments.

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ities Corp.; Gravcap, Inc.; Heat Transfer Research Inc.; Inland Corp.; LOCAP, Inc.; LOOP, Inc.; MESBIC Financial Corp. of Houston; Oil Companies Institute for Marine Pollution Compensation Ltd.; Oil Insurance Ltd.; Olympic Pipe Line Co.; Ozark Pipe Line Co.; Plantation Pipe Line Co.; Rancho Pipe Line System; Royal Dutch Petroleum Co.; Seadock, Inc.; Shell Petroleum, N.W.; The "Shell" Transport and Trading Co. Ltd.; Ship Shoal Pipe Line System; Thums Long Beach Co.; West Shore Pipe Line Co.; and Wolverine Pipe Line Co.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 683 F.2d 1253 and is reprinted in Appendix A(1a). The opinion of the United States District Court for the Central District of California is reported at 520 F. Supp. 1359 and is reprinted in Appendix B(37a).

JURISDICTION

On August 12, 1982, the United States Court of Appeals for the Ninth Circuit entered a judgment affirming in part, reversing in part, vacating in part, and staying in part the decision of the District Court. The Ninth Circuit's judgment is reprinted in Appendix C(90a). On November 10, 1982, that court denied petitions for rehearing filed by California and the environmental

group plaintiffs. The court's order denying rehearing is reprinted in Appendix D(91a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

STATUTES INVOLVED

Section 307(c)(1) of the Coastal Zone Management Act (CZMA), 16 U.S.C. § 1456(c)(1) (1976), provides:

> "Each Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs."

Section 19 of the Outer Continental Shelf Lands Act (OCSLA), as amended, 43 U.S.C. § 1345 (1980), provides in pertinent part:

> "(a) Any Governor of an affected State or the executive of any affected local government in such State may submit recommendations to the Secretary regarding the size, timing, or location of a proposed lease sale . . . .
>
> * * *
>
> "(c) The Secretary [of the Interior] shall accept recommendations of the Governor . . . if he determines, after having provided the opportunity for consultation, that they provide for a reasonable balance between the national interest and the well-being of the citizens of the affected State. . . ."
>
> "(d) The Secretary's determination that recommendations provide, or do not provide, for a reasonable balance between the national interest and the well-being of the citizens of the

> affected State shall be final and shall not, alone, be a basis for invalidation of a proposed lease sale . . . unless found to be arbitrary or capricious."

STATEMENT OF THE CASE

This case involves the Department of the Interior's decision to offer for leasing 29 tracts in the Santa Maria Basin located in federal waters, more than three miles off shore the California Counties of Santa Barbara and San Luis Obispo, as part of OCS Sale No. 53. The lower courts held that the Department properly decided that the leasing of those tracts was in the national interest, as required by Section 19 of the OCSLA, and was in compliance with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 (1976), and the Endangered Species Act (ESA), 16 U.S.C. § 1531 (1976). Nonetheless, the lower courts enjoined leasing of the tracts on the ground that Section 307(c)(1) of the CZMA required the Secretary of the Interior to make a written determination that such leasing is consistent to the maximum extent practicable with California's CZMA program.

A. The Administrative Process Preceding Interior's Decision

Four years of planning and analysis preceded the leasing of OCS tracts in the Santa Maria Basin. Pursuant to NEPA, an extensive environmental impact statement (EIS) was compiled. Pursuant to the ESA, the Fish and Wildlife Service (FWS) provided a biological opinion that the Secretary's proposed offering of Santa Maria Basin

tracts "is not likely to jeopardize the continued existence of the [Southern] sea otter," a "threatened species" under the ESA. Pursuant to Section 19 of the OCSLA, the Department of the Interior received and reviewed the recommendations of Governor Brown of California that the 34 northernmost Santa Maria Basin tracts (out of 115 proposed for leasing) should not be leased since they are "directly seaward of the habitat, breeding, and food supply areas of the Southern Sea Otter." C.R. 85; A.R. 224w at 2.

Notwithstanding the NEPA, ESA and OCSLA processes, California sought to bar leasing of the northern Santa Maria Basin tracts adjoining the sea otter habitat by invoking the CZMA. On December 16, 1980, the California Coastal Commission (CCC) adopted a resolution objecting to the leasing of the 31 northern tracts within 12 miles of the range of the southern sea otter. C.R. 85; A.R. 217w. This resolution was grounded upon the CCC's concern with the possibility that production of oil might years later occur on those tracts and give rise to the possibility of an oil spill which might impact that species.[3]

Ultimately on April 10, 1981, having the NEPA, ESA, and OCSLA record before him, as well as the CCC's CZMA resolutions, the Secretary of the Interior determined to proceed with the leasing of all 115 Santa Maria Basin tracts. In so doing, he first determined that the leasing stage of the Sale No. 53 project would not "directly affect" the California coastal zone within the meaning of Section 307(c)(1) of the CZMA. Instead, the Secretary

[3] The CCC reiterated this concern in a resolution of March 31, 1981, and paradoxically relied upon the FWS biological opinion as to the sea otter, even though the FWS had found that the preliminary stages of leasing and exploration would not jeopardize that species and could therefore proceed. C.R. 85; Attachment to A.R. 406w at 13.

concluded that all coastal zone impacts which might possibly occur would arise at the later stages of the project and would be subject to CZMA analysis at that time.

The Secretary then analyzed Governor Brown's recommendation to delete the 34 northern Santa Maria Basin tracts. In responding to the Governor's recommendation, the Secretary stated that

> "[o]ur initial purpose in offering these tracts is to permit exploration so that the potential oil and gas reserves, if any, can be inventoried. . . . Later, should recoverable reserves be identified, the OCS Lands Act would require further environmental documentation and safeguards [prior to development and production of those reserves]." *Id.* C.R. 85; A.R. 461w.

The Secretary ultimately concluded that the "national benefits [in proceeding with leasing] far outweigh[] the potential for harm to the well-being of the citizens of California." *Id.*

B. Proceedings in the Lower Courts

1. The District Court's Decision

On April 29, 1981, California and various environmental groups filed separate complaints seeking an injunction against leasing the 34 northernmost Santa Maria Basin tracts under the OCSLA, NEPA, ESA, and the Marine Mammal Protection Act (MMPA), 16 U.S.C. § 1361 (1976). They sought similar relief against leasing 31 of those tracts under Section 307(c)(1) of the CZMA.

On May 27, 1981, the district court tentatively rejected plaintiffs' OCSLA, NEPA, ESA and MMPA claims. However, it held that plaintiffs had shown a probability of success on their CZMA theory that OCS leasing "directly affect[s]" a coastal zone and thus cannot be conducted in

the absence of a formal determination that leasing will be consistent with an approved CZMA program. The court, therefore, entered a preliminary injunction which allowed the bids on the CZMA-challenged tracts to be opened, but enjoined the Secretary from accepting those bids.

On May 28, 1981, the Santa Maria Basin lease sale took place as scheduled.[4] Bids on 19 of the CZMA-challenged tracts were submitted, collectively totalling more than $220 million.

On August 18, 1981, the district court entered summary judgment for California and the local governments on their CZMA claim. The district court found that the Department of the Interior's leasing of OCS tracts "would invariably directly affect the coastal zone in all but the most unusual case—a case which probably could only be posed as a hypothetical . . . ." (71a). In the trial court view, the "direct" effects, which triggered the command of Section 307(c)(1) that leasing be conducted "in a manner that is consistent, to the maximum extent practicable, with" the California Coastal Management Program (CCMP), were the potential impacts that might arise at the later post-leasing stages of the Sale No. 53 project. (72a-73a). Since Interior had not determined that these potential impacts were consistent with the CCMP, the court issued a permanent injunction cancelling the sale of all the CZMA-challenged tracts.[5]

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[4] The final notice consolidated the 115 tracts that had been described in the proposed notice sent to Governor Brown into 111 tracts covering precisely the same area. By virtue of this consolidation, the 34 tracts complained of by the Governor were reduced to 32 and the 31 focused upon by the CCC were reduced to 29.

[5] The district court stayed its injunction to provide defendants an opportunity to apply to the Ninth Circuit for a stay pending appeal. On August 26, 1981, that court granted that stay.

The district court entered summary judgment for defendants on all of the other issues and ruled that environmental groups had no standing to invoke the CZMA.

2. The Ninth Circuit's Decision

Both sides filed cross appeals, and on August 12, 1982, the Ninth Circuit rendered its opinion. (1a). Adopting the trial court's characterization of the "direct" effects of an OCS lease sale, the court held that the Secretary's decision to select particular tracts for leasing "established the first link in a chain of events which could lead to production and development of oil and gas on the individual tracts leased." (14a).

Although agreeing with the district court that Section 307(c)(1) required the Department of the Interior to make a consistency determination before proceeding with leasing, the court of appeals, unlike the district court, held that federal activities need be consistent with a state CZMA program only "to the maximum extent practicable." (21a, 24a).

The Ninth Circuit disclaimed the ability to delineate how such consistency might be achieved in this or future cases. Stating that "verbal formulas cannot eliminate the necessity of examining each situation with care," the court noted that future disagreements between the States and federal agencies concerning consistency determinations would be subject to mediation within the Department of Commerce. (25a). Although the Ninth Circuit did not refer to them, applicable regulations defining mediation procedures, 15 C.F.R. § 930.43, make it

clear that they are voluntary, nonbinding, and, in serious disputes, merely a prelude to later federal litigation.[6]

After thus disposing of the merits of the CZMA dispute, the court held that environmental groups have standing under the APA, 5 U.S.C. § 702, to institute litigation demanding the preparation of a consistency determination.[7]

The Ninth Circuit affirmed the trial court's rulings for defendants under both NEPA and Section 19 of the OCSLA.[8] As to the latter, it recognized the narrow scope of review open to a court and upheld the Secretary of the Interior's rejection of the Governor's recommendations to delete the northern Santa Maria Basin tracts and his determination that the leasing of those tracts was in the national interest. (30a-31a).[9]

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[6] The court stayed the district court's injunction cancelling the CZMA-disputed portion of the Santa Maria Basin sale, pending the Department of the Interior's preparation of a determination that its decision to lease the northern Santa Maria Basin tracts was consistent with the CCMP. The court of appeals left open the question whether it would uphold the district court's cancellation of the sale if it were to find the consistency determination inadequate. (26a).

[7] The court did not explicitly address defendants' challenge to the local governments' standing. However, both its mandate and the rationale it used to extend standing to environmental groups reveal that it rejected defendants' appeal on this point.

[8] Plaintiffs did not appeal the district court's ESA or MMPA rulings.

[9] On petitions for rehearing, plaintiffs argued that the Ninth Circuit had misconstrued the term "maximum extent practicable" in Section 307(c)(1) when it rejected their claim that the Department of the Interior must conform to a state's interpretation of its CZMA program. Plaintiffs contended that the lower court's interpretation of the statute was inconsistent with rules published under Section 314

THE QUESTION PRESENTED IS SUBSTANTIAL

This Court Should Review the Ninth Circuit's Determination that the Secretary of the Interior's Leasing of OCS Tracts is Governed by the CZMA.

If the lower courts' construction of the phrase "activ-it[y] directly affecting" the coastal zone is left unreviewed by this Court, the Department of the Interior will be compelled for all future OCS lease sales to survey all potential impacts of an OCS project, even if distant in time or remote in probability, and, on the basis of this highly speculative data, seek to conform its leasing of OCS tracts "to the maximum extent practicable" with state CZMA programs. Such a requirement will give rise to disputes which ultimately must be resolved in federal litigation as to whether the proper degree of consistency has been achieved.[10]

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of the CZMA, 16 U.S.C. § 1463, by the National Oceanic and Atmospheric Administration. *See* 15 C.F.R. § 930.32. On November 10 the Ninth Circuit denied plaintiffs' petitions for rehearing without opinion.

[10] Petitioners' concern with litigation under Section 307(c)(1) spawned by the Ninth Circuit's ruling is not based on mere speculation. Following the district court's ruling in this case, the States of California, New Jersey, and North Carolina, as well as the North Slope Borough in Alaska, have filed lawsuits under that section challenging Interior's selection of tracts for OCS sales or the lease stipulations adopted for operations on those tracts. *See California* v. *Watt*, 17 E.R.C. 1711 [BNA] (C.D. Cal. June 11, 1982) (Sale 68); *Kean* v. *Watt*, No. 82-2420 (D.N.J.) (Sale RS-2); *North Carolina* v. *Watt*, No. 81-472-CIV-5 (E.D.N.C.) (Sale 56); *North Slope Borough* v. *Watt*, No. A82-421 (D. Alaska) (Sale BF).

The Ninth Circuit's grant of standing to parties unaffiliated with the State heightens petitioners' concern with Section 307(c)(1) litiga-

1. Given the consequences attached to its proper construction, the Ninth Circuit should have analyzed with painstaking care the term "activit[y] directly affecting" the coastal zone to ensure that its interpretation of the statute was the one intended by Congress. *See Griffin* v. *Oceanic Contractors, Inc.*, ___ U.S. ___, 102 S.Ct. 3245, 3250 (1982) ("There is of course no more persuasive evidence of the purpose of the statute than the words by which the legislature undertook to give expression to its wishes.")[11] However, this Court will search the Ninth Circuit's opinion in vain for any recognition of its obligation to give effect to the terms of Section 307(c)(1).

This omission is not remedied by recourse to the district court's opinion. To the contrary, the district court chastised defendants for the "invocation of the plain meaning rule" which it held would merely "cloud the issue." It held that "reliance on the plain meaning rule" was "verbal table thumping" that would be a "subterfuge in the present case" producing "an unreasonable result." (67a).

Rather than addressing the plain terms of the statute, both the Ninth Circuit and the district court erroneously based their decisions upon their perception of the purposes of the CZMA and upon statements of congressional committees made eight years after the enactment of Sec-

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tion. In two cases within the past year, private environmental groups and local governments have invoked that section against portions of OCS lease sales not challenged by the adjacent State. *California* v. *Watt, supra; North Slope Borough* v. *Watt, supra.*

[11] *See also Watt* v. *Energy Action Educational Foundation*, 454 U.S. 151, 162 (1981); *CBS* v. *FCC*, 453 U.S. 367, 377-79 (1981); *United States* v. *Turkette*, 452 U.S. 576, 580 (1981); *American Textile Manufacturers Institute, Inc.* v. *Donovan*, 452 U.S. 490, 508 (1981); *Howe* v. *Smith*, 452 U.S. 473, 488 (1981).

tion 307(c)(1). *See* pp. 18-19, *infra*. In so ignoring the plain meaning of Section 307(c)(1), as well as subsequent amendments to the CZMA and OCSLA integrating the two statutes, the lower courts committed error that would justify review by this Court even in a case with lesser consequences. *A fortiori*, such an error should be corrected by this Court when, as here, it threatens to erect litigation obstacles to the nation's foremost energy program, the expedited development of oil and gas from our OCS. *See Watt* v. *Energy Action Educational Foundation*, 454 U.S. 151 (1981).

2. Proper application of the plain meaning rule would have led the lower courts to a different result in this case.

This case concerns solely the leasing stage of an OCS project. This stage involves the selection of particular tracts for leasing, the conduct of an OCS lease sale, and the award of leases. Leasing is followed by two other distinct stages which are preceded by Department of the Interior decision-making and state CZMA review: exploration and production.

At the leasing stage, the Department itself takes no action having any physical impacts upon a coastal zone and normally authorizes no action by lessees which are likely to have such effects. As the D.C. Circuit held in *North Slope Borough* v. *Andrus*, 642 F.2d 589, 593-94 (D.C. Cir. 1980):

> "[a]s provided in the [OCSLA], the lease sale itself is only a preliminary and relatively self-contained stage within an overall oil and gas development program which requires substantive approval and review prior to implementation of each of the major stages: leasing, exploring, producing.
>
> ". . . Once the Secretary accepts 'high' bids and executes leases, lessees are permitted by federal law,

> Department regulations and lease stipulations to engage only in 'preliminary activities.' " (Emphasis and footnote omitted.)[12]

Here, neither of the lower courts found that any environmental impacts were expected during the leasing stage of the OCS No. 53 project or that any operations during that stage would affect the California coastal zone.

Moreover, little was said by the lower courts about coastal zone impacts associated with the second stage of an OCS project—exploration. As was implicitly recognized below (72a-73a) and as other courts have explicitly stated,[13] the environmental impacts of exploration are minimal. Indeed, in this case the FWS based its biological opinion, which sanctioned both leasing and exploration, on the premise that there was a very low risk of exploration oil spills. (83a).

In any event, such minimal coastal zone impacts as may occur during exploration are clearly subject to prior Department of the Interior authorization and state CZMA scrutiny: An OCS lessee must file a plan describing the operating procedures which it intends to follow, and exploration may be authorized only if the exploration-related coastal zone impacts are consistent with applicable state CZMA programs. Section 11(c)(2), OCSLA, 43 U.S.C. § 1340(c)(2); Section 307(c)(3)(B), CZMA, 16 U.S.C. § 1456(c)(3)(B).

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[12] *See also Conservation Law Foundation* v. *Andrus*, 623 F.2d 712, 715 (1st Cir. 1979); *County of Suffolk* v. *Secretary of the Interior*, 562 F.2d 1368, 1378 (2d Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978).

[13] *Village of Kaktovik* v. *Watt*, 689 F.2d 222, 225-26 (D.C. Cir. 1982).

Most of the impacts relied upon by the lower courts as showing that OCS leasing is an "activit[y] directly affecting" the California coastal zone—pipeline construction, spills from platforms, migration of labor into the area (72a-73a)—are potential impacts which cannot occur until the much later development/production stage of the project. In many cases, this stage is never reached since exploration often fails to discover any commercial quantities of OCS oil or gas; in virtually no case are all portions of an area that is made available for leasing later committed to development and production.[14]

Even if this third stage of an OCS project is reached, a lessee must submit a development and production plan for departmental approval. Section 25 OCSLA, 43 U.S.C. § 1351. The lessee must also certify that the "activities" proposed in its development/production plan "affecting land or water uses within a coastal zone" are consistent with a state CZMA program. Section 307(c)(3)(B), CZMA, 16 U.S.C. § 1456(c)(3)(B). The Department retains authority to disapprove this stage, if, after consideration of statutorily defined factors, it concludes that development and production would "probably cause serious harm or damage . . . to the marine, coastal or human environment. . . ." 43 U.S.C. § 1351(h)(1)(D). It must disapprove development/production if the lessee fails to satisfy the requirements of the CZMA. 43 U.S.C. § 1351(h)(1)(B).

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[14] After heated litigation at the leasing stage of OCS Sale No. 39 (Gulf of Alaska), No. 40 (Baltimore Canyon), and No. 42 (Georges Bank), exploration was allowed to proceed, but has not to date produced sufficient evidence of commercial quantities of oil and gas to justify development and production. *See generally Alaska* v. *Andrus*, 580 F.2d 465 (D.C. Cir.), *vacated in part as moot*, 439 U.S. 922 (1978); *Conservation Law Foundation* v. *Andrus*, *supra*; *County of Suffolk* v. *Secretary of the Interior*, *supra*.

Clearly, OCS leasing does not "directly" affect the coastal zone merely because there is some possibility that years later operations might be authorized which would have physical impacts upon the coastal zone. In holding to the contrary here, the lower courts have simply ignored the plain terms of the statute.[15]

This conclusion is buttressed by the fact that neither court offered any definition of the terms of Section 307(c)(1) to support its construction of the Act. Had the lower courts adopted any of the conventional definitions for the term "directly" recited by the district court—"simultaneously"; "without any intervening agency or instrumentality of a determining influence"; "without any intermediate step"; "without a moment's delay"; "at once, immediately" (66a-67a)—they could not have concluded that OCS leasing "directly affect[s]" the coastal zone. In equating "directly affecting" with "the first link in a chain of events" possibly leading to impacts on the coastal zone

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[15] Regulations interpreting closely analogous statutory language under NEPA are inconsistent with the lower courts' view of the CZMA. NEPA requires analysis of "major federal action significantly affecting the environment." 42 U.S.C. § 4332(2)(c). Thus, NEPA regulations require an impact statement to discuss both "direct" and "indirect" effects of such actions. 40 C.F.R. § 1502.16. However, in defining those terms, NEPA regulations clearly define as "indirect effects" the type of impacts relied upon by the lower courts here as the basis for applying Section 307(c)(1):

> " 'Effects' include:
>
> (a) direct effects, which are caused by the action and occur at the same time and place.
>
> (b) indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8.

at later stages of an OCS project, the lower courts read the term "directly" out of the statute. (14a).[16]

3. Congress went to unusual lengths to specify the manner in which the CZMA should be applied to OCS projects. In doing so, it articulated a view of the statute contrary to the one embraced by the lower courts.

The 1980 committee reports upon which the lower courts relied state that the original 1972 CZMA, which enacted Section 307(c)(1), gave the States "no part in any decision concerning development on the [OCS]."[17] In 1976 Congress amended the CZMA, but left Section 307(c)(1) intact. However, Section 307(c)(3)(B), 16 U.S.C. § 1456(c)(3), was added to the statute to permit the States to apply their CZMA programs at the later exploration and production/development stages of OCS projects, not at the leasing stage. As the 1976 Conference Report

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[16] No other circuit has construed Section 307(c)(1) as it applies to the initial leasing stage of an OCS project. However, *California* v. *Watt*, 668 F.2d 1290 (D.C. Cir. 1981), rejected contentions advanced by California that the Secretary was obliged to consider California's CZMA program when he included Sale No. 53 on the five-year leasing schedule published under Section 18 of the OCSLA, 43 U.S.C. § 1344. Instead, the D.C. Circuit held that the CZMA applies to "specific proposed activities" and referred to that part of the CZMA which is applicable to the exploration and development/production stages of an OCS project. 668 F.2d at 1310-11 & n.99.

Although the D.C. Circuit's opinion was emphasized in defendants' briefs and oral argument, the Ninth Circuit did not refer to it. This omission is particularly significant, since the inclusion of a particular sale on the five-year leasing schedule fits the Ninth Circuit's "first link" characterization of the type of OCS decision requiring CZMA analysis. *See* 43 U.S.C. § 1344(d)(3), providing that the inclusion of a sale on the five-year schedule is a necessary prerequisite to the Department's subsequent conduct of a lease sale.

[17] H.R. Rep. No. 1012, 96th Cong., 2d Sess. 26 (1980).

stated, this amendment "applie[d] the consistency requirement to the basic steps in the OCS leasing process—namely, the exploration, development and production plans submitted to the Secretary of the Interior." S. Conf. Rep. No. 987, 94th Cong., 2d Sess. 30 (1976).[18]

In 1978 when Congress amended the OCSLA, it specifically integrated the CZMA and OCSLA in a manner fully consistent with the 1976 amendments to the CZMA and equally inconsistent with the result reached by the courts below. In 43 U.S.C. § 1802(6), Congress described one of

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[18] The legislative history underlying the 1976 amendments vividly illustrates Congress' intention not to apply the CZMA to the leasing stage of OCS projects. A proposed amendment to Section 307(c)(3) would have added the term "lease" to the "license" and "permit" which are subject to a consistency review under that section. This amendment was characterized by the Senate Committee as having the very effect which the lower courts have now read into Section 307(c)(1):

> "[i]n practical terms, . . . the Secretary of the Interior would need to seek the certification of consistency from adjacent State governors before entering into a binding lease agreement with private oil companies." S. Rep. No. 277, 94th Cong., 1st Sess. 20 (1975).

The amendment was opposed by the Department of the Interior on the ground that it might be construed as a "requirement that the lease applicant prove Federal consistency before he is physically able to do it." Hearings on CZMA before Subcommittee on Oceanography of House Committee on Merchant Marine and Fisheries, 94th Cong., 1st Sess. 204 (1975). Because of these and similar concerns, the amendment that would have added the term "lease" to Section 307(c)(3) was deleted on the House floor to permit further clarification of the matter in conference. 122 Cong. Rec. 6128 (1976). The conference decided not to subject leases to CZMA consistency review.

the basic purposes underlying the 1978 amendments to the OCSLA as

> "[a]ssur[ing] that States . . . which are directly affected by exploration, development, and production of oil and natural gas are provided an opportunity to participate in policy and planning decisions relating to management of the resources of the [OCS]."

Congress thus recognized that States would be "directly affected" by the later stages of an OCS project, but not by leasing itself. Because of these later "direct" effects, Congress provided "an opportunity [for States] to participate in policy and planning decisions" in the OCSLA.

Section 19 of the OCSLA provides that opportunity with respect to OCS leasing. It gives the States the right to submit "recommendations" as to the "size, timing or location" of OCS leasing to the Secretary which he shall accept, unless through his assessment of the national interest, which that section describes as "final," he concludes that more expansive leasing is required.[19] As noted, California submitted Section 19 recommendations in this case, and the lower courts upheld the Secretary's determination that the national interest justified the leasing of those tracts to which the State objected.

Section 19 is silent as to CZMA review at the leasing stage. However, in the light of the "direct" effects poten-

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[19] The States are also provided the opportunity to participate in policy and planning decisions at the even earlier stage when a five-year leasing program is being developed. *See* p. 18, n.20 *infra*. At that point, States are given the right to submit comments upon the program, and the Secretary must provide Congress with a written explanation as to how he dealt with those comments. 43 U.S.C. § 1344(c) & (d).

tially suffered by the States at the exploration and production/development stages, the OCSLA explicitly recognizes that their CZMA programs apply at those stages. 43 U.S.C. § 1340(c)(2) (exploration); 43 U.S.C. § 1351(h)(1) (production/development).[20]

4. The lower courts erroneously relied upon what they perceived to be the "purposes" of the CZMA and upon 1980 post-enactment statements by congressional committees concerning the scope of Section 307(c)(1).

The Ninth Circuit's conclusion that the "major purpose of the CZMA . . . to avoid conflict and encourage cooperation between the federal and state governments" dictates state application of CZMA programs to OCS leasing decisions is clearly wrong. As the 1978 amendments to the OCSLA show, it is not necessary to adopt a broad construction of Section 307(c)(1) of the CZMA to provide the States with opportunities for consultation concerning the OCS program.

The Ninth Circuit also erred in relying upon 1980 statements of congressional committees as to Section 307 of the CZMA. Since Congress did not amend Section 307 in 1980 (nor even consider doing so), the committees' discussion of the section was wholly gratuitous and received

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[20] Section 201(f) of the OCSLA, 43 U.S.C. § 1331(f), also reflects the error of the court below. That provision of the statute defines the term "affected state" as one "in which there is a substantial probability of significant impact . . . resulting from the exploration, development, and production of oil and gas anywhere on the [OCS]. . . ." In so qualifying as an "affected state," as opposed to a "directly affect[ed]" state under the CZMA, a State is entitled to submit comments under Section 18 with respect to the five-year leasing schedule and to make recommendations under Section 19 as to the size, timing, or location of a particular lease sale.

no scrutiny on the floor of the House or Senate. Such post-enactment commentary by congressional committees is in no sense "legislative history" as to a prior enactment.[21] *See CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980):

> "The less formal types of subsequent legislative history [as opposed to subsequent legislation] provide an extremely hazardous basis for inferring the meaning of a Congressional enactment. . . . Such history does not bear a strong indicia of reliability . . . because as time passes memories fade and a person's perception of his earlier intention may change."[22]

This Court's observation in *GTE Sylvania* is particularly appropriate here, since the 1980 committee members who subscribed to the reports did not even purport to follow the intent of their 1972 predecessors. To the contrary, they stated that in 1972 Congress had not made specific provision for state input into OCS leasing decisions. *See* p. 15 & n.17, *supra*. The Ninth Circuit contradicted *GTE Sylvania*, as well as a host of other decisions of this Court, in placing "substantial weight" (17a) upon the 1980 committee reports.[23]

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[21] *United Airlines, Inc.* v. *McMann*, 434 U.S. 192, 200 n.7 (1977).

[22] *See also Bread Political Action Comm.* v. *FEC*, ___ U.S. ___, 102 S.Ct. 1235, 1237-38 (1982).

[23] *See Weinberger* v. *Rossi*, ___ U.S. ___, 102 S.Ct. 1510, 1517 (1982); *County of Washington* v. *Gunther*, 452 U.S. 161, 176 n.16 (1981); *United States* v. *Clark*, 445 U.S. 23, 33 n.9 (1980); *Quern* v. *Mandley*, 436 U.S. 725, 736 n.10 (1978); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132-33 (1974); *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 348-49 (1963); *United States* v. *United Mine Workers*, 330 U.S. 258, 281-82 (1947).

CONCLUSION

For the reasons recited above, this Court should grant a writ of *certiorari* to review the Ninth Circuit's decision. Moreover, petitioners request that the Court set this case for argument at the earliest possible time.[24] Such expedition is necessary because the Ninth Circuit's ruling, until reversed by this Court, will pose severe litigation obstacles to the OCS program.

Respectfully submitted,

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*Counsel of Record

February 8, 1983

[24] While not directly applicable to the CZMA claim in this action, Section 23(d) of the OCSLA, 43 U.S.C. § 1349(d), which was designed by Congress to deal with OCS litigation, provides that

> "Except as to causes of action which the court considers of greater importance, any action under this section shall take precedence on the docket over all other causes of action and shall be set for hearing at the earliest practical date and expedited in every way."

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

Nos. 81-5699 to 81-5701, 81-5811 to 81-5815, 81-5720 and 81-5822

The STATE OF CALIFORNIA, acting By and Through Governor Edmund G. BROWN, Jr., the California Coastal Commission, the California Air Resources Board, the California Resources Agency, the California Department of Fish and Game, the California Department of Conservation, *Plaintiffs-Appellees*,

v.

James G. WATT, as Secretary of the Interior; the United States Department of the Interior; Edward Hastey, as Acting Director of the United States Bureau of Land Management; Robert Burford, as Director Designate of the United States Bureau of Land Management, in his official capacity as Director when and if assumed; the United States Bureau of Land Management, *Defendants*,

Western Oil and Gas Association, a regional trade association; Amoco Production Company, a corporation; Atlantic Richfield Company, a corporation; Champlin Refining Company, a corporation; Chevron U.S.A. Inc.; Cities Service Company, a corporation; Conoco, Inc.; Elf Acquitaine Oil and Gas, a corporation; Exxon Corporation; Getty Oil Company, a corporation; Gulf Oil Corporation; Phillips Petroleum Company, a corporation; and Shell Oil Company, a corporation, *Defendants-in-Intervention/Appellants*.

NATURAL RESOURCES DEFENSE COUNCIL, INC.; the Sierra Club; Friends of the Earth; Friends of the Sea

Otter; and the Environmental Coalition on Lease Sale 53, *Plaintiffs-Appellees*,

v.

James G. WATT, as Secretary of the Interior, etc., et al., *Defendants*,

Western Oil and Gas Association, a regional trade association, etc., et al. *Defendants-in-Intervention/Appellants*.

STATE OF CALIFORNIA, acting By and Through Governor Edmund G. BROWN, Jr., etc., et al., *Plaintiffs-Appellees*.

County of Humboldt; County of Marin; County Mendocino; County of Monterey; County of San Luis Obispo; County of San Mateo; County of Santa Barbara; County of Santa Clara; County of Sonoma; City and County of San Francisco; City of Brisbane; City of Capitola; City of Carmel-By-the-Sea; City of Los Angeles; City of Morro Bay; City of Pismo Beach; City of San Luis Obispo; City of Santa Barbara; City of Santa Cruz; City of Santa Monica; City of Seaside; Association of Monterey Bay Area Governments, *Plaintiffs-in-Intervention/Appellees*,

v.

James G. WATT, as Secretary of the Interior, etc., et al., *Defendants-Appellants*.

NATURAL RESOURCES DEFENSE COUNCIL, INC., etc., et al., *Plaintiffs*,

County of San Diego, *Plaintiff-in-Intervention/Appellant*,

v.

James G. WATT, as Secretary of the Interior, etc., et al., *Defendants-Appellees*,

Western Oil and Gas Association, a
regional trade association, etc., et al.,
Defendants-in-Intervention/Appellees.

NATURAL RESOURCES DEFENSE
COUNCIL, INC., etc., et al.,
Plaintiffs-Appellants,

v.

James G. WATT, as Secretary of the
Interior, etc., et al.,
Defendants-Appellees.

STATE OF CALIFORNIA, acting By and Through Governor
Edmund G. BROWN, Jr., etc., et al., *Plaintiffs,*

County of San Diego,
Plaintiff-in-Intervention/Appellant,

v.

James G. WATT, as Secretary of the
Interior, etc., et al.,
Defendants-Appellees,

Western Oil and Gas Association, a
regional trade association, etc., et al.,
Defendants-in-Intervention/Appellees.

NATURAL RESOURCES DEFENSE
COUNCIL, INC., etc., et al.,
Plaintiffs,

County of Humboldt, etc., et al.,
Plaintiffs-in-Intervention/Appellants,

v.

James G. WATT, as Secretary of the
Interior, etc., et al.,
Defendants-Appellees,

Western Oil and Gas Association, a
regional trade association, etc., et. al.,
Defendants-in-Intervention/Appellees.

The STATE OF CALIFORNIA, acting By and Through Governor Edmund G. BROWN, Jr., etc., et al., *Plaintiffs-Appellants*,

County of Humboldt, etc., et al.,
Plaintiffs-in-Intervention,

v.

James G. WATT, as Secretary of the Interior, etc., et al.,
Defendants-Appellees,

Western Oil and Gas Association, a regional trade association, etc., et al.,
Defendants-in-Intervention/Appellees.

NATURAL RESOURCES DEFENSE COUNCIL, INC., etc., et al.,
Plaintiffs-Appellees,

County of Humboldt, etc., et al.,
Plaintiffs-in-Intervention/Appellees,

v.

James G. WATT, as Secretary of the Interior; etc., et al.,
Defendants-Appellants.

The STATE OF CALIFORNIA, acting By and Through Governor Edmund G. BROWN, Jr., etc., et al., *Plaintiffs*,

County of Humboldt, etc., et al.,
Plaintiffs-in-Intervention/Appellants,

v.

James G. WATT, as Secretary of the Interior, etc., et al.,
Defendants-Appellees.

Argued and Submitted Jan. 15, 1982. Decided Aug. 12, 1982.

On cross motions for summary judgment in suit brought by state of California and agencies thereof alleging that federal defendants had violated federal statutes in offering for competitive bidding certain oil and gas leases on tracts located in outer continental shelf, the United States District Court for the Central District of California, Mariana R. Pfaelzer, J., 520 F.Supp. 1359, entered judgment. Appeal was taken. The Court of Appeals, Sneed, Circuit Judge, held that: (1) the Secretary of Interior violated Coastal Zone Management Act by selling oil and gas leases without determination of consistency with state coastal zone management plan; (2) Department of Interior did not violate National Environmental Policy Act by failing to supplement environmental impact statement; (3) Secretary did not violate Outer Continental Shelf Lands Acy by refusing to accept recommendations of governor regarding lease sale; and (4) environmental groups had standing to enforce consistency provision of Coastal Zone Management Act.

Affirmed in part, reversed in part, vacated in part and stayed in part.

Theodora Berger, Deputy Atty. Gen., Los Angeles, Cal., for State of Cal.

Donatas Januta, San Francisco, Cal., argued, for Coastal Counties and Cities; Irwin D. Karp, Januta & Karp, San Francisco, Cal., on brief.

Greer Knopf, Deputy County Counsel, San Diego, Cal., for San Diego County.

Trent W. Orr, Natural Resources Defense Council, San Francisco, Cal., argued, for Natural Resources Defense Counsel; Sarah Chasis, Natural Resources Defense Council, New York City, Julie E. McDonald, Sierra Club Legal Defense Fund, San Francisco, Cal., on brief.

E. Edward Bruce, Covington & Burling, Washington, D.C., for Watt, Western Oil & Gas Ass'n, et al.

Peter R. Steenland, Jr., Atty., Dept. of Justice, Washington, D.C., for U.S.

H. Bartow Farr, III, Joseph N. Onek, Peter E. Scheer, Onek, Klein & Farr, Washington, D.C., for amicus curiae Coastal States Organization.

Appeal from the United States District Court for the Central District of California.

Before SNEED, TANG and PREGERSON, Circuit Judges.

SNEED, Circuit Judge:

This appeal concerns a dispute over the proposed sale by the United States Department of Interior of leases to drill for and extract oil and gas in the outer continental shelf (OCS) off the coast of California.

Plaintiffs below were the State of California and various agencies within the state. Intervening as plaintiffs were various cities and counties in California (hereafter "local governments"). Plaintiffs in a companion case, which was consolidated with this one, were the Natural Resources Defense Council, the Sierra Club, Friends of the Earth, Friends of the Sea Otter, and the Environmental Coalition on Lease Sale 53 (hereafter 'environmental groups"). Defendants in both cases below were James G. Watt, acting in his official capacity as Secretary of the Interior, the Department of Interior, Robert Burford, acting in his official capacity as Director of the Bureau of Land Management, and the Bureau of Land Management (BLM). Intervening as defendants in both actions were Western Oil and Gas Association (WOGA), a regional trade association of companies and individuals in the petroleum industry, and various oil companies that had submitted high bids on one or more tracts offered in Lease Sale No. 53.

Plaintiffs claimed below that defendants violated five federal statutes in offering for competitive bidding certain oil and gas leases on tracts located in the Santa Maria Basin. Finding that there were no genuine issues of material fact in the two consolidated cases, the district court granted summary judgment

to the plaintiffs on their claim based on the Coastal Zone Management Act (CZMA), granted summary judgment to defendants on the remaining issues, and dismissed the claims of the environmental groups for lack of standing. The court enjoined leasing of the disputed tracts and ordered the bids and deposits returned but stayed the effect of the latter order pending appeal.[1] All parties appealed. We affirm in part, reverse in part, vacate in part, and stay in part.

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[1] The district court order reads as follows:

"ORDER AND SUMMARY JUDGMENT

The parties' cross-motions for summary judgment, pursuant to Fed.R.Civ.P. 56, and defendant-intervenors' motion for summary judgment, or, in the alternative, motion to dismiss the complaints of Natural Resources Defense Council, *et al.*, and of the County of Humboldt, *et al.*, pursuant to Fed.R.Civ.P. 12(b)(6), came on for hearing before the Honorable Mariana R. Pfaelzer on July 10, 1981. All parties appeared by and through their respective counsel of record. Having reviewed and considered the administrative record and the memoranda, affidavits, and exhibits filed by the parties, and having heard and considered the oral arguments of counsel, and having taken the matter under submission, the Court has incorporated its Findings of Fact and Conclusions of Law in the Opinion filed herewith. Accordingly,

IT IS ORDERED, ADJUDGED AND DECREED that:

1. Plaintiffs' Motion for Summary Judgment in CV 81-2080, with respect to the claim arising under the Coastal Zone Management Act, 16 U.S.C. §§ 1451 *et seq.*, is granted. Defendants' Motion for Summary Judgment with respect to plaintiffs' claim arising under the Coastal Zone Management Act is denied.

2. Defendants' decision to lease Tracts 129 to 142, 144 to 146, 148 to 155 and 158 to 161 in the northern portion of the Santa Maria Basin for oil and gas development was made in violation of the Coastal Zone Management Act.

3. Any bids received for the tracts at issue are declared null and void and the monies posted shall be returned to the bidders.

4. Any oil and gas leases for any of the tracts at issue herein awarded as part of Lease Sale No. 53 are declared null and void.

I.

ISSUES ON APPEAL

There are four issues on appeal which we state as follows:

1. CZMA Issue: Did the Secretary of Interior violate Section 307(c)(1) of the CZMA by selling oil and gas leases for the

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5. Defendants and defendant-intervenors, their officers, agents, employees, representatives, and all persons acting in concert with them, are hereby enjoined from awarding, approving or taking any action or allowing others to take any action pursuant to any leases for any of the tracts at issue, until such time as defendants comply with the requirements of the Coastal Zone Management Act by conducting a consistency determination on the tracts at issue and by conducting all activities on these tracts in a manner consistent with California's Coastal Management Plan.

6. Defendant's Motion for Summary Judgment in CV 81-2080 with respect to plaintiffs' claims arising under the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331 *et seq.*, the National Environmental Protection Act, 42 U.S.C. §§ 4231 *et seq.*, the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*, and the Marine Mammal Protection Act, 16 U.S.C. §§ 1361 *et seq.*, is granted. Plaintiffs' Motion for Summary Judgment in CV 81-2080 with respect to the claims arising under these statutes is denied.

7. Defendant-intervenors' Motion to Dismiss Plaintiffs, Natural Resources Defense Council, *et al.*, in CV 81-2081 pursuant to Fed.R. Civ.P. 12(b)(6) is granted.

8. Defendant-intervenors' Motion to Dismiss Plaintiff-intervenors County of Humboldt, *et al.*, in CV 81-2080 pursuant to Fed.R.Civ.P. 12(b)(6) is denied.

9. Each Party shall bear its own costs.

10. Judgment is hereby entered.

The Court shall retain continuing jurisdiction over this case to ensure compliance with this Order."

California v. *Watt*, 520 F.Supp. 1359, 1389 (C.D.Cal.1981).

outer continental shelf without a determination of consistency with California's coastal zone management plan? Our answer is that he did.

2. NEPA Issue: Did the Department of Interior violate the National Environmental Policy Act (NEPA) by failing to supplement the Environmental Impact Statement? Our answer is that it did not.

3. OCSLA Issue: Did the Secretary violate section 19 of the Outer Continental Shelf Lands Act (OCSLA) by refusing to accept the recommendations of the Governor of the State of California regarding Lease Sale 53? Our answer is that he did not.

4. Standing Issue: Do the environmental groups have standing to enforce the consistency determination provision of the CZMA? Our answer is that they do.

II.

STANDARD OF REVIEW

As already noted, summary judgment was granted by the district court on all issues. Our review is identical to that of the district court. *Washington ex rel. Edwards* v. *Heimann*, 633 F.2d 886, 888 n.1 (9th Cir. 1980). That is, we may affirm a summary judgment only if, viewing the evidence in the light most favorable to the party against whom it is granted, we find no genuine issue of material fact, and we find that the prevailing party is clearly entitled to judgment as a matter of law. *Id.* at 888; *Dosier* v. *Miami Valley Broadcasting Corp.*, 656 F.2d 1295, 1300 (9th Cir. 1981).

III.

FACTS AND BACKGROUND

While the facts and background of these cases are complex, they are thoroughly laid out in the district court opinion. *California* v. *Watt*, 520 F.Supp. 1359, 1365-68 (C.D.Cal. 1981). To

aid the reader of this opinion, however, we shall summarize briefly the pertinent facts and background of these cases.

The lease sale in dispute is Lease Sale 53, consisting of a maximum offering of 243 designated tracts of the OCS for mineral development. The tracts in Lease Sale 53 lie in five different basins off the coast of California, including the Santa Maria Basin. That basin extends generally from Point Sur in Monterey County in the north to Point Conception in Santa Barbara County in the south. During the course of decision-making on Lease Sale 53, the Department of Interior at various times proposed leasing within the Santa Maria Basin only and at other times within all five of the basins originally included.

In November 1977, BLM issued a Call for Nominations for Lease Sale 53. The Call requested the petroleum industry to designate specific tracts on which it was interested in bidding if a sale were held. It also asked federal, state, and local governments, universities, environmental organizations, research institutions, and the public to identify specific tracts that they believed should be excluded from leasing or should be leased under particular restrictions due to conflicting resource values or environmental factors. In October 1978 the Department of Interior announced the tentative tract selection for Lease Sale 53. The Santa Maria Basin contained 115 of the 243 tracts involved in the sale.

A draft Environmental Impact Statement (EIS) was released for public comment in April 1980. The draft EIS, which analyzed the environmental impacts in the five basins to be included in Lease Sale 53, was based on a reserve estimate of 404 million barrels of oil for the Santa Maria Basin.

In Septem[illegible]r, 1980, a final EIS was released. Shortly before its publication, on or about August 28, 1980, the United States Geological Survey made available revised reserve estimates for the Santa Maria Basin in the amount of 794 million barrels of oil. The revised estimate was incorporated in an addendum to the EIS. A Secretary Issue Document (SID), an internal docu-

ment intended to aid the Secretary in making decisions concerning lease sales, was released in October 1980. The SID concerned the potential impact of Lease Sale 53 on the environment, and concluded that a supplemental EIS was not needed.

On July 6, 1980, the California Coastal Commission requested that the Secretary submit a consistency determination at the time of the issuance of the proposed notice of sale. On October 16, 1980, the former Secretary of the Interior, Cecil D. Andrus, issued the proposed notice of sale for Lease Sale 53. The notice proposed leasing only within the Santa Maria Basin, the four other basins being deleted from the proposed sale. By letter of October 22, 1980, the Department of Interior notified the California Coastal Commission (CCC) of its "negative determination," to the effect that the preleasing activities associated with Lease Sale 53 would have no "direct effects" on California's coastal zone, and that as a consequence no consistency determination was necessary. In response to this negative determination, on December 16, 1980, the CCC adopted a resolution that the deletion of 29 tracts in the northern portion of the Santa Maria Basin was necessary in order for Lease Sale 53 to be consistent with the California Coastal Management Plan. On December 24, 1980, Governor Edmund G. Brown, Jr. of California, responding to Secretary Andrus' proposed notice of sale, recommended the deletion of 32 tracts located in the northern protion of the Santa Maria Basin.

The new Secretary of Interior, James G. Watt, issued a revised proposed notice of sale for Lease Sale 53 on February 10, 1981. The four basins previously deleted from the proposed sale by former Secretary Andrus were once more included in the sale. The revised notice continued to propose leasing in the Santa Maria Basin. In transmitting the revised proposal to Governor Brown, Secretary Watt requested recommendations pursuant to section 19 of the OCSLA, 43 U.S.C. § 1345. By letter dated April 7, 1981, Governor Brown submitted his recommendations concerning the revised Lease Sale 53. He reiterated his position that, based upon the balancing test of section 19, the northern 32 tracts in the Santa Maria Basin

should be deleted from the sale. Enclosed with the letter detailing Governor Brown's recommendations were comments and recommendations from various state agencies and local governments in California.

On April 10, 1981, the Department of Interior issued a news release in which Secretary Watt announced that he planned to divide Lease Sale 53 into two sales, with the sale of the tracts in the Santa Maria Basin to be held in May 1981 and the sale of the remaining tracts to be postponed. The Secretaty stated that his decision to lease the entire Santa Maria Basin was based on a finding of overriding national interest. The final notice of sale for Lease Sale 53, Santa Maria Basin, was published on April 27, 1981.

By letter dated May 1, 1981, Secretary Watt notified Governor Brown of the rejection of California's recommendations concerning the lease sale in the Santa Maria Basin, and provided a brief explanation of the basis for the rejection.

On April 29, 1981, California sought an injunction in district court against the lease sale. The court, although it allowed bids on the tracts to be received and opened, on May 27, 1981, granted a preliminary injunction which prevents the Department of Interior from accepting or rejecting the bids or issuing leases on the disputed tracts. California and the local governments moved for summary judgment on their claim that Lease Sale 53 violated numerous statutes. Secretary Watt and the other federal defendants cross-claimed for summary judgment on the same issues. The response of the district court to these motions has already been indicated.

We find that no genuine issue of material fact exists. The questions before us, therefore, are whether the parties prevailing below are clearly entitled to their judgments as a matter of law. We now turn to the four legal issues with which this appeal is concerned.

IV.

COASTAL ZONE MANAGEMENT ACT

This issue concerns the application of CZMA Section 307(c)(1), 16 U.S.C. § 1456(c)(1), to the lease sale stage of outer continental shelf (OCS) oil, gas, and mineral development. Section 307(c)(1) reads:

> Each Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs.

While it is conceded on appeal that this section does apply at the lease sale stage, the parties vigorously dispute whether Lease Sale 53 would have "direct effects" on California's coastal zone.

We hold that Lease Sale 53 would "directly affect" the state's coastal zone. The district court so held and we agree. The federal appellants and oil companies (hereafter collectively referred to as "federal appellants") propose a definition of "directly affecting" that limits the scope of direct effects from a lease sale to those effects that "are part of, or immediately authorized by, a lease sale." *See* Brief For The Federal Appellants at 21-22; Brief of Appellants Western Oil & Gas Association at 27. Subsequent steps such as the promulgation of exploration or development plans are not direct effects of the lease sale, their argument runs, because separate consistency determinations are required at each of these later stages. It follows that a lease sale has no direct effects upon the coastal zone; such direct effects as there may be affect things other than the coastal zone. This definition and reasoning underlies the Secretary of Interior's determination that no consistency determination is required.

California, the local governments, and the amici curiae environmental groups (hereafter collectively referred to as "California") propose a broader definition of "directly affecting," encompassing effects of the lease sale that the lessor "reasonably anticipates." Another formulation of this definition is that

any activity having a functional interrelationship from an economic, geographic, or social standpoint with lands and waters in the coastal zone directly affects the coastal zone. The district court adopted this broad definition, holding that the federal appellants "cannot deny that leasing activities have consequences in the coastal zone by pointing to a series of events which occur after the leases are issued, but before the actual effects are realized." *California* v. *Watt*, *supra*, 520 F.Supp. at 1379-80.

We agree that the lease sale in this case directly affects the coastal zone. These direct effects of Lease Sale 53 on California's coastal zone are detailed by the district court. *Id.* at 1371, 1380-82. We need not repeat them here. It is enough to point out that decisions made at the lease sale stage in this case establish the basic scope and charter for subsequent development and production. Prior to the sale of leases, critical decisions are made as to the size and location of the tracts, the timing of the sale, and the stipulations to which the leases would be subject. These choices determine, or at least influence, whether oil will be transported by pipeline or ship, which areas of the coastal zone will be exposed to danger, the flow of vessel traffic, and the siting of on-shore construction. *Id.*

Under these circumstances Lease Sale 53 established the first link in a chain of events which could lead to production and development of oil and gas on the individual tracts leased. This is a particularly significant link because at this stage all the tracts can be considered together, taking into account the cumulative effects of the entire lease sale, whereas at the later stages consistency determinations would be made on a tract-by-tract basis under section 307(c)(3). The narrow definition of "directly affecting" urged upon us by the federal appellants would diminish the ability of the state to protect its coastal zone and to influence activities that were set in motion at the lease sale stage.

A. *Purpose Of The CZMA*

This diminution would not be consistent with the purposes of the CZMA, which was enacted to promote the preservation of natural resources in the coastal zone. 16 U.S.C. § 1452(1). Under the Act, each coastal state has primary authority over the lands and waters within its three-mile coastal zone, to be exercised "in cooperation with Federal and local governments and other vitally affected interests." 16 U.S.C. § 1451(i).

A key element in the CZMA's comprehensive plan is the voluntary adoption by each coastal state of a federally-approved coastal zone management plan, which must adequately consider the "national interest" and "the views of Federal agencies principally affected by such program." 16 U.S.C. §§ 1455(c)(8), 1456(b). The Act requires the state's plan to include a "planning process for energy facilities likely to be located in, or which may significantly affect, the coastal zone, including, but not limited to, a process for *anticipating and managing* impacts from such facilities." 16 U.S.C. § 1454(b)(8) (emphasis added). A quid pro quo for the state's development of such a plan is that certain federal activities will be conducted consistently with the state's plan. 16 U.S.C. § 1456(c).

Thus, a major purpose of the CZMA is to avoid conflict and encourage cooperation between the federal and state governments in developing a comprehensive plan for long-term management of the resources in the coastal zone. 16 U.S.C. §§ 1451, 1452. To effectuate this purpose, the state must be permitted to become involved at an early stage of a significant and comprehensive activity, such as Lease Sale 53, that will eventually have an appreciable impact on the coastal zone. The narrow definition urged upon us by the federal appellants would preclude this early involvement.

B. *Legislative History*

Our approach is not inconsistent with the legislative history of the CZMA. Although, as the district court pointed out, the legislative history of this Act is "inconclusive," 520 F.Supp. at

1371, it does lend support, when considered as a whole, to our approach.

In 1972, the Conference Committee substituted the phrase "directly affecting the coastal zone" for "in the coastal zone," in an apparent attempt to expand the scope of the provision. *See id.* No clue is given in 1972 as to how "directly" was to be interpreted. In 1976, in conjunction with amendments to CZMA sections other than 307(c)(1), the Senate Report noted:

> There is very little coordination or communcation between Federal agencies and the affected coastal States prior to major energy resource development decisions, such as the decision to lease large tracts of the OCS for oil and gas.
>
> . . . Full implementation of the Coastal Zone Management Act of 1972 . . . could go far to institute the broad objectives of Federal-State cooperative planning envisioned by the framers of the act.

S.Rep. No. 277, 94th Cong., 2d Sess. 3, *reprinted in* 1976 U.S.Code Cong. & Ad.News, 1768, 1770.

In the Coastal Zone Management Improvement Act of 1980, Pub.L. No. 96-464, 94 Stat. 2060 (1980), Congress did not amend the section 307(c)(1) consistency provisions, but the reports of both the Senate and House Committees support a broad interpretation of "directly affecting." *See* 520 F.Supp. at 1372-73. The Senate report stated that:

> intergovernmental coordination for purposes of OCS development commences *at the earliest practicable time* in the opinion of the Committee, as the Department of the Interior *sets in motion a series of events which have consequences* in the coastal zone.

S.Rep. No. 783, 96th Cong., 2d Sess. 11 (1980). (Emphasis added). The House Committee specifically addressed the uncertainty that had arisen concerning the interpretation of the threshold test of "directly affecting" the coastal zone. H.R.Rep. No. 1012, 96th Cong., 2d Sess. 34-35, *reprinted in* 1980 U.S.Code Cong. & Ad.News 4382-83. The Committee offered two alternative definitions of the phrase "directly

affecting:" (1) The threshold test applies "whenever a Federal activity [has] a functional interrelationship from an economic, geographic or social standpoint with a State coastal program's land or water use policies." *Id.* at 34, *reprinted in* 1980 U.S.Code Cong. & Ad.News at 4382. (2) The Federal consistency requirements should apply "when a Federal agency initiates a series of events of coastal management consequence." *Id.* The House indicated its support of an "expansive interpretation of the threshold test," *id.* at 35, *reprinted in* 1980 U.S.Code Cong. & Ad.News at 4383, and reiterated the Senate's statement that consultation between federal and state agencies should occur "at the earliest practicable time." *Id.* at 34, U.S.Code Cong. & Ad.News at 4382; *see also* S.Rep. No. 783, *supra*.

We recognize that these post-enactment committee statements might not represent a view adopted by Congress after full deliberation and, in any event, are not conclusive. However, these statements must be given appropriate weight. *See Andrus* v. *Shell Oil Co.*, 446 U.S. 657, 666 n.8, 100 S.Ct. 1932, 1938 n.8, 64 L.Ed.2d 593 (1980); *Walt Disney Productions* v. *United States*, 480 F.2d 66, 68 (9th Cir. 1973), *cert. denied*, 415 U.S. 934, 94 S.Ct. 1451, 39 L.Ed.2d 493 (1974). In the circumstances of this case we accord them substantial weight because they appear to us to serve better the purposes of the CZMA than would the narrower interpretation urged by the federal appellants.

C. *National Oceanic And Atmospheric Administration's Interpretation*

Our approach does no violence to our obligation to pay deference to the appropriate agency's interpretation of section 307(c)(1). The National Oceanic and Atmospheric Administration (NOAA) is the agency within the Department of Commerce charged with the responsibility of promulgating regulations for the CZMA. *American Petroleum Institute* v. *Knecht*, 456 F.Supp. 889, 908 (C.D.Cal. 1978), *aff'd*, 609 F.2d 1306 (9th

Cir. 1979). Its current view of the definition of "directly affecting" is unclear.

Until May 1981, NOAA consistently took the position that pre-leasing activities were subject to consistency review, and favored a broad interpretation of "directly affecting." *See Watt* v. *California*, *supra*, 520 F.Supp. at 1376-77. In 1978, NOAA stated that section 307(c)(1) was intended to apply to "all Federal actions which were *capable of significantly affecting* the coastal zone." 43 Fed.Reg. 10,510-11 (1978) (emphasis added). Although NOAA deleted this definition in 1979 in response to a Department of Justice opinion taking issue with that portion of the definition, 44 Fed.Reg. 37,142 (1979), it reiterated the view that "Federal agencies are encouraged to construe liberally the 'directly affecting' test in borderline cases so as to favor inclusion of Federal activities subject to consistency review." 44 Fed.Reg. 37,146-47 (1979). Along the same lines in 1980, NOAA noted:

> In our view Federal consistency requirements subject final notices of OCS sales to consistency determinations. This critical decision point in the OCS process influences tracts to be selected and stipulations to be imposed and thus sets in motion actions which will *invariably* affect coastal resources.

Letter from NOAA to State Coastal Management Program Directors (April 9, 1980) (emphasis added).

In May 1981, shortly after complaints were filed in the present case, NOAA filed a notice of proposed rulemaking defining "directly affecting" in a way more nearly consistent with, if not identical to, that urged on us by the appellants. 46 Fed.Reg. 26,658-59 (1981). According to the definition, a federal activity directly affects the coastal zone only:

> if the Federal agency finds that the conduct of the activity itself produces a measurable physical alteration in the coastal zone or that the activity initiates a chain of events

> reasonably certain to result in such alteration, *without further required agency approval.*

Id. (emphasis added). In the comments to this notice, NOAA listed lease issuance as an example of an activity that would not be subject to a consistency determination because it does not directly affect the coastal zone. *Id.* at 26,660. On July 2, 1981, NOAA issued its notice of final rulemaking. In late July and early August, however, resolutions were introduced in both houses of Congress disapproving the new regulations. *Cf.* 16 U.S.C. § 1463a. After the district court decision in this case, and following a vote by the House Merchant Marine and Fisheries Committee to disapprove the regulations on October 16, 1981, NOAA suspended the effective date of the regulations and moved to withdraw them, explicitly acknowledging the negative reaction it had received from both Congress and the coastal states. 46 Fed.Reg. 50,937, 50,976 (1981).

An agency's interpretation of a statute, while not having the force of law, is entitled to deference if we can conclude that the regulation "implement[s] the congressional mandate in some reasonable manner." *United States* v. *Vogel Fertilizer Co.*, ___ U.S. ___, 102 S.Ct. 821, 827, 70 L.Ed.2d 792 (1982), *quoting United States* v. *Correll*, 389 U.S. 299, 307, 88 S.Ct. 445, 449, 19 L.Ed.2d 537 (1967); *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 672 F.2d 732, at 734-735 (9th Cir. 1982). This general principle of deference, while fundamental, only sets the framework for judicial analysis, *United States* v. *Vogel Fertilizer Co.*, *supra*, 102 S.Ct. at 827, *quoting United States* v. *Carturight*, 411 U.S. 546, 550, 93 S.Ct. 1713, 1716, 36 L.Ed.2d 528 (1973), and poses no obstacle in this case to our rejection of appellants' approach.

As indicated, NOAA's short-lived narrow definition of "directly affecting" was first proposed during the pendency of this litigation, was specifically disapproved by some members and at least one Committee of Congress, was contrary to NOAA's long-standing position on the matter, and may not reflect NOAA's present view. To defer to such a passing phase in the appropriate agency's interpretation would amount to

obeisance to shadows and a flight from judicial responsibility. On the other hand, we acknowledge that NOAA's earlier view that "directly affecting" should be liberally construed provides support to our holding that Lease Sale 53 must be accompanied by a section 307(c)(1) consistency determination.

D. *Consistency With Outer Continental Shelf Lands Act*

The federal appellants also claim that a definition of "directly affecting," other than one substantially similar to NOAA's aborted narrow view, is inconsistent with section 19 of the OCSLA. This section provides for Department of Interior consideration of state governors' recommendations regarding "size, timing, or location" of lease sales. We acknowledge, as we must, that federal statutes should be construed in a consistent and harmonious manner. Only in this way can congressional intent be given its fullest expression. *Get Oil Out! Inc.* v. *Exxon Corp.*, 586 F.2d 726, 729 (9th Cir. 1978).

We find no conflict between our holding with respect to the scope of "directly affecting" as applicable to the facts of this case and the functions and purposes of the OCSLA. The CZMA and the OCSLA focus on different concerns—the OCSLA on development of oil and gas resources, and the CZMA on environmental concerns. *American Petroleum Institute* v. *Knecht*, *supra*, 456 F.Supp. at 919. They impose on the federal government separate obligations owing to different parties, and are capable of co-existence. Their consistency is further supported by the "savings clause" in the OCSLA, which expressly provides: "[N]othing in this Act shall be construed to modify, or repeal any provision in the Coastal Zone Management Act of 1972." 43 U.S.C. § 1866. We, therefore, conclude that Lease Sale 53 cannot proceed until the Secretary of Interior makes a determination that the proposed lease is consistent, to the maximum extent practicable, with the California coastal zone management plan.

E. *Placement Of Final Authority To Determine That The OCS Lease Sale 53 Is Consistent To The Maximum Extent Practicable*

To hold that the Secretary of Interior is required by CZMA § 307(c)(1) to make a consistency determination before going ahead with Lease Sale 53 unavoidably raises additional issues. Foremost among these is whether consistency to the maximum extent practicable of the federal activity with the approved state management program means simply conformity to the program in the manner deemed appropriate by the state concerned. The federal appellants insist that the district court, in effect, so held by enjoining the lease sale "until such time as defendants comply with the requirements of the Coastal Zone Management Act by conducting a consistency determination on the tracts at issue and by conducting all activities on these tracts in a manner consistent with California's Coastal Management Plan." 520 F.Supp. at 1389.

Assuming *arguendo* that the district court did so hold, we here reject that interpretation of the CZMA. The statute does not provide that a state's plan takes precedence when it would preclude the federal activity, or even that the federal activity must be as consistent with the plan as is *possible*. It only provides that the activity be consistent *to the maximum extent practicable*. The Act is not explicit with respect to the location of final authority to determine whether the required consistency exists. We believe such authority must reside in the Executive Branch of the federal government subject, of course, to such judicial review as is appropriate. To hold otherwise on the basis of silence, or at best attenuated inferences drawn from the language of Congress, weighs too lightly the interests of the Nation against that of a state.

Our conclusion is suppported by the language and structure of both the CZMA and the OCSLA, as well as the history of events leading to the enactment of the OCSLA.

1. CZMA.

With respect to any plan for the exploration, development, and production stages, section 307(c)(3) of the CZMA sets out an elaborate procedure for dealing with disagreements between a coastal state and an applicant for a federal license or permit to conduct an activity affecting the coastal zone concerning the consistency of the federal activities and the state's management program. Under this section, to obtain a federal license or permit the state must certify that the activity is consistent unless the Secretary of Commerce properly finds that the activity "*is consistent with the objectives of this chapter or is otherwise necessary in the interest of national security.*" 16 U.S.C. § 1456(c)(3)(A)-(B) (emphasis added). This provision clearly precludes an irreversible state veto of OCS activity at the exploration, development, and production stages. The Secretary of Commerce is given the final say as to whether the activity is consistent with the objectives of the CZMA, and if not, whether it is otherwise necessary in the interest of national security. It would be anomalous for Congress to have provided the state with final authority unilaterally to nip these activities in the bud, by reason of the application of section 307(c)(1) to lease sales, in the face of its careful scheme in section 307(c)(3) to assure that a state cannot unilaterally stop the activity at later stages. We do not think it intended to so provide.

2. OCS History And The OCSLA.

The history of the dispute concerning offshore resources supports our conclusion that a conclusive state veto was never intended over OCS oil and gas development. In 1953, to settle the long-standing dispute between the federal government and coastal states concerning control over offshore areas, Congress enacted the Submerged Lands Act, 43 U.S.C. §§ 1301-43. This "1953 Compromise" of the so-called Tidelands Oil Issue granted coastal states "title to and ownership of" submerged lands within three miles of the coast, the area referred to as the "coastal zone." 43 U.S.C. §§ 1301(a), 1311(a). The

federal government was given exclusive proprietary control over "the soil and seabed of the Continental Shelf" outside this three-mile zone. 43 U.S.C. §§ 1302, 1332(a). The CZMA was not intended to change this division of control. Section 307(e) of the CZMA provides that:

> Nothing in this title shall be construed—
>
> (1) to diminish either Federal or state jurisdiction, responsibility, or rights in the field of planning, development, or control of water resources, submerged lands, or navigable waters.

16 U.S.C. § 1456(e). *See also*, H.R.Conf. Rep. No. 1544, 92d Cong., 2d Sess. 7, 12 (1972).

Granting final veto power to coastal states would thwart the purposes of the OCSLA. As the Supreme Court has recently stated, "Congress primarily was concerned in enacting OCSLA to assure federal control over the Shelf and its resources." *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 101 S.Ct. 2870, 2877, 69 L.Ed.2d 784 (1981). In 1978, in response to concern over increased dependence on foreign oil, the OCSLA was amended to:

> establish policies and procedures for managing the oil and natural gas resources of the [OCS] which are intended to result in expedited exploration and development of the [OCS] in order to achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in world trade.

43 U.S.C. § 1802(1). These are vitally important goals for the well-being of the country, and the ultimate management authority over their achievement is vested in the federal government and not a particular coastal state.

Section 19 of the OCSLA, 43 U.S.C. § 1345, it is true, instructs the Secretary of Interior to consider recommendations by the Governor of an affected state regarding the size, timing, or location of a proposed lease sale. 43 U.S.C. § 1345(a). The section gives great weight to the Governor's

recommendations, providing that the Secretary of Interior "shall accept" them if they provide a reasonable balance between the national interest and the well-being of the citizens of the state. Nevertheless, it is explicitly provided that the Secretary's decision to reject such recommendation is final, unless his decision is arbitrary or capricious. 43 U.S.C. § 1345(c), (d). The finality of the Secretary of Interior's decision under this section is another strong indication that the federal government is intended to have the ultimate authority over the OCS leasing program.

We, therefore, interpret section 307(c)(1) to require that Lease Sale 53 be made consistent with California's plan to the maximum extent practicable. Accommodation to California's plan to a lesser extent does not afford consistency *to the maximum extent practicable*. Accommodation to a greater extent exceeds the command of the statute. In making this consistency determination, the Secretary of Interior may take into account that further consistency determinations will be made at the exploration, development, and production stages, when more complete information will be available. *See* 16 U.S.C. § 1456(c)(3). In other words, the lease sale need not be configured so as to preclude *any* possible future inconsistency from arising as development proceeds. The Secretary of Interior, however, must set the leasing, development, and production activities on a path that is consistent with the state plan to the maximum extent practicable in light of the then available knowledge.

The limit beyond which conformity with a state plan would not be practicable to the maximum extent cannot be precisely delineated. Such factors as the extent to which leasing, exploration, development, drilling, and production would be hampered or proscribed by conformity; the reasonableness of the state plan; as well as the terms of the particular proposed lease sale must be examined. Beyond this it is difficult to go; verbal formulas cannot eliminate the necessity of examining each situation with care and sensitivity to the concerns of the state and the nation.

3. **Settlement Of Disputes As To Consistency By Secretary Of Commerce.**

Inasmuch as the Secretary of Interior has not yet made the consistency determination that we hold he must with respect to Lease Sale 53, it is not possible to know whether the Secretary of Interior and the State of California will disagree on whether the required consistency determination reflects consistency "to the maximum extent practicable." In making the consistency determination, the Secretary of Interior undoubtedly will be guided by a spirit of federal/state cooperation. Should the state disagree with the Secretary's consistency determintion, sections 307(c) and (h) contain mediation procedures that may be invoked by the Secretary of Commerce to reconcile the paramountcy of the national interest with the concerns of the state. We do not regard subsection (c)(1) of section 307 as lacking, or existing independently of, those procedures explicitly set forth in subsections (c)(3) and (h).

F. *Remedy*

As already indicated, the district court's order required the federal appellants to conduct "all activities on [the tracts at issue] in a manner consistent with California's Coastal Management Plan." 520 F.Supp. at 1389. The premise on which this order rests appears to be that California's view of consistency ultimately will be controlling. We do not agree with this premise. We, therefore, affirm only that portion of paragraph 5 of the district court's order that requires a consistency determination to be made before Lease Sale 53 goes forward. That is, paragraph 5 is affirmed insofar as it reads:

> Defendants and defendant-intervenors, their officers, agents, employees, representatives, and all persons acting in concert with them, are hereby enjoined from awarding, approving or taking any action or allowing others to take any action pursuant to any leases for any of the tracts at issue, until such time as defendants comply with the requirements of the Coastal Zone Management Act by conducting a consistency determination on the tracts at issue . . . .

We modify that paragraph to delete the remainder, which provides as follows: "and by conducting all activities on these tracts in a manner consistent with California's Coastal Management Plan." If the State does not agree with a determination of consistency by the Secretary of Interior, the dispute-resolution procedures of the CZMA are available.[2]

The district court also voided the bids for the tracts at issue and ordered the deposits returned to the bidders. *Id.* The federal appellants and oil companies argue that the cancellation of bids after their contents have been revealed is excessive, punitive, unprecedented, and destroys the essence of secret bidding procedures, thus causing the loss of millions of dollars the bidders spent compiling the data for the bids.[3] They argue that such drastic measures should be deferred at least until it is finally decided whether Lease Sale 53 can go forward in its present form. We agree. The resolution of the dispute must await a consistency determination by the Secretary of Interior. If the state does not agree with this determination, final resolution of the conflict must await the outcome of the CZMA dispute resolution procedures. During the pendency of these procedures, the status quo should be maintained. Therefore, we stay the portion of the district court's order (*i.e.*, paragraphs 3 and 4) requiring the cancellation of the bids and return of the deposits and that portion of paragraph 5 of the

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[2] Appellants also object to the district court's failure to perform a "particularized analysis" of possible remedies and their consequences, as required by *Alaska* v. *Andrus*, 580 F.2d 465 (D.C.Cir.), *vacated in part on other grounds*, 439 U.S. 922, 99 S.Ct. 303, 58 L.Ed.2d 315 (1978). Although this claim appears to have merit, we do not reach the issue of the applicability of *Alaska* v. *Andrus*, in view of our disposition on other grounds of the remedy ordered below.

[3] WOGA concedes that it suggested to the lower court the very remedy to which it now objects, but this does not affect our decision on this issue.

order which required that federal lease sale activities be conducted consistently with California's coastal zone management plan.

To the extent that the deleted portion of paragraph 5 also requires that all other activities, including exploration, development, or production, be conducted consistently with California's plan, it embraces activities and stages of off-shore oil development not at issue in this case. Only the lease sale is at issue. We therefore vacate the district court's order insofar as it extends beyond the lease sale stage.

Finally, we retain jurisdiction over this appeal, and if the consistency determination process is not completed within a reasonable time we will entertain a motion to vacate our stay.

On the CZMA issue, therefore, we hold as follows:

(1) We affirm the district court's order insofar as it requires a consistency determination for Lease Sale 53.

(2) We stay the district court's order insofar as it declares bids and leases null and void and requires return of monies posted and insofar as it requires federal lease sale activities to be conducted consistently with California's coastal zone management plan.

(3) We vacate the district court's order insofar as it applies beyond the lease sale stage.

V.

NATIONAL ENVIRONMENTAL POLICY ACT

California also sought to enjoin the lease sale on the basis of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4331 *et seq.* It contends that the federal government's failure to supplement the Environmental Impact Statement (EIS) to incorporate the latest estimates of oil and gas reserves in the basin was a violation of section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C). That section requires that an EIS be prepared and circulated for major federal actions affecting the quality of the human environment.

The Bureau of Land Management (BLM) released the final EIS on Lease Sale No. 53 in early September, 1980, incorporating the original estimates of oil and gas reserves provided by the United States Geological Survey (USGS). A few days before the release of the EIS, on August 28, 1980, the USGS released revised estimates of the oil and gas reserves. These new figures indicated that the reserves were thought to be roughly twice those originally estimated. Although the BLM did not alter the body of the EIS to reflect the new figures, it did attach the new estimates to the EIS as an Addendum. Also, a Secretary Issue Document (SID) was prepared for the Secretary of Interior in October, 1980, containing revised estimates of the environmental impacts using the new data. It was concluded in the SID, which is a public document, that a supplement to the EIS was not needed.

The district court granted summary judgment to the federal government on this issue, holding that:

> the decision of the Department of Interior not to file a supplement or to revise the existing EIS in the few days remaining before publication is not unreasonable.

520 F.Supp. at 1383. We affirm.

The district court in its analysis focused on the adequacy of the initial EIS. 520 F.Supp. at 1382, *quoting Columbia Basin Land Protection Ass'n* v. *Schlesinger*, 643 F.2d 585, 592 (9th Cir. 1981). While we agree that the initial EIS was adequate, new information may require its supplementation. *Warm Springs Dam Task Force* v. *Gribble*, 621 F.2d 1017 (9th Cir. 1980). A federal agency has a continuing duty to gather and evaluate new information relevant to the environmental impact of its actions, even after release of an EIS. *Id.* at 1023-24. Guidelines of the Council on Environmental Quality require that agenices:

> (1) Shall prepare supplements to either draft or final environmental impact statements if:
>
> * * *

(ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

40 C.F.R. § 1502.9(c).

An agency's decision not to supplement an EIS will be upheld if it was reasonable. *Warm Springs Dam, supra*, at 1024. Reasonableness depends on the environmental significance of the new information, the probable accuracy of the information, the degree of care with which the agency considered the information and evaluated its impact, and the degree to which the agency supported its decision not to supplement with a statement of explanation or additional data. *Id.* We hold that the decision of the BLM not to supplement the EIS for Lease Sale 53 was not unreasonable.

Whether the revisions to the estimates of oil reserves will change the environmental impact of Lease Sale 53 significantly is problematic. The accuracy of the data is open to question, given the inherently speculative nature of oil reserve estimates. Also, the qualitative impacts on the environment possibly could be the same under either set of estimates. In fact, in the SID only a small quantitative increase in impact was estimated. We acknowledge being influenced by the fact that additional Environmental Impact Statements will be required at the later exploration, production, and development stages, and these will, of course, be based on the latest reserve estimates available at the time they are prepared.

The revised estimates of oil and gas reserves were made available to the public as an addendum to the EIS, and environmental impact estimates using the new data were made public in the SID. While a SID cannot substitute for a supplemental EIS, in this case it supports a holding that the Department of Interior carefully considered the information and its impact before concluding that a supplementary EIS was unnecessary. The SID also provides a detailed explanation for the Secretary of Interior's decision not to supplement. While the Addendum and SID did not go through the public comment process, that process is not essential every time new information comes to

light after an EIS is prepared. Were we to hold otherwise, the threshold decision not to supplement an EIS would become as burdensome as preparing the supplemental EIS itself, and the continuing duty to gather and evaluate new information, *Warm Springs Dam*, *supra*, at 1023, could prolong NEPA review beyond reasonable limits.

The district court did not err in its conclusion with respect to the NEPA issue.

VI.

OUTER CONTINENTAL SHELF LANDS ACT

Section 19 of the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1345, provides, as already noted, that the governor of an affected state may submit recommendations to the Secretary of Interior regarding the size, timing, or location of a proposed lease sale. 43 U.S.C. § 1345(a). The Secretary is required to accept the governor's recommendations "if he determines . . . that they provide for a reasonable balance between the national interest and the well-being of the citizens of the affected State." 43 U.S.C. § 1345(c). The statute provides that the Secretary's acceptance or rejection of such recommendations shall be final, "unless found to be arbitrary or capricious." 43 U.S.C. § 1345(d). *See, e.g., Ethyl Corp.* v. *EPA*, 176 U.S.App.D.C. 373, 541 F.2d 1 (D.C. Cir. 1976).

California claims that Governor Brown's recommendations provided for a reasonable balance between national and state interests, and thus that the Secretary's failure to accept the Governor's recommendations was arbitrary and capricious. California also contends that the Secretary violated certain procedural requirements of Section 19.

As the district court properly noted, the scope of our review is limited. In determining whether the Secretary's rejection of the Governor's recommendations was arbitrary or capricious, we must consider whether the decision was based on a consideration of the relevant factors and whether there was a clear error of judgment. *Citizens to Preserve Overton Park* v. *Volpe*,

401 U.S. 402, 416, 91 S.Ct. 814, 823, 28 L.Ed.2d 136 (1971), *quoted in Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285, 95 S.Ct. 438, 441, 42 L.Ed.2d 447 (1974); *Washington State Farm Bureau* v. *Marshall*, 625 F.2d 296, 302 (9th Cir. 1980). Additionally, we must consider whether the Secretary "articulate[d] a rational connection between the facts found and the choice made," *Bowman Transportation, Inc., supra*, 419 U.S. at 285, 95 S.Ct. at 441, and whether the Secretary made the decision in accordance with his duty under law. *American Petroleum Institute* v. *Knecht*, 456 F.Supp. 889, 904-05, *aff'd*, 609 F.2d 1306 (9th Cir. 1979). The court may not substitute its judgment for that of the agency.

The district court, while not impressed with the spirit with which the Secretary dealt with the Section 19 requirements, held that, giving due deference to his judgment, the Secretary's decision to reject Governor Brown's recommendations was not legally "arbitrary and capricious." 520 F.Supp. 1385-86. We agree.

The Secretary did analyze factors weighing in the balance of interests, and described this analysis in a letter mailed to Governor Brown on May 1, 1981. As the district court noted, the OCSLA provides little or no guidance as to the proper basis for the Secretary's evaluation of a governor's recommendation. It provides that the Secretary must determine whether the governor's recommendation draws a "reasonable balance" between two key factors—the "national interest" and the "well-being of the citizens of the affected State." 43 U.S.C. § 1345(c). The statute requires that the determination of the "national interest" encompass "the desirability of obtaining oil and gas supplies in a balanced manner," but does not attempt to define the factors relevant to the citizens' well-being. *Id.*

The Secretary evaluated such "quantifiable factors" as income from resource development and expected monetary losses due to oil spills, and such "not quantifiable" factors as damage to wildlife, decline in water quality, and "aesthetic and

lifestyle losses." 520 F.Supp. 1384. We agree with the district court that the Secretary gave some consideration to the relevant factors and his decision cannot be said to be arbitrary or capricious.

California also claims that the Secretary failed to comply with the procedural requirements of Section 19 by not providing sufficient opportunity for the Governor to consult and by not adequately communicating to the Governor in writing his reasons for rejecting the recommendation. 43 U.S.C. § 1345(c).

The statute requires that the Secretary in making the decision to accept or reject the recommendation provide the Governor "the *opportunity* for consultation." 43 U.S.C. § 1345(c) (emphasis added). We agree with the district court that the Secretary's consultation with Governor Brown was adequate to meet the technical requirements of the statute. 520 F.Supp. 1385. The statute also requires the Secretary to "communicate to the Governor, in writing, the reasons for his determination to accept or reject such Governor's recommendations." 43 U.S.C. § 1345(c). We also agree with the court below that the Secretary's explanatory letter to the Governor satisfied this requirement, and that the timing of the letter—after announcement of his decision to go ahead with the lease sale and two days after suit was filed on this matter in district court—does not render it ineffective in fulfilling the statutory requirement. 520 F.Supp. 1385.

Having concluded that the Secretary complied with the procedural requirements of Section 19 of the OCSLA and that his decision to reject Governor Brown's recommendation was not arbitrary or capricious, we affirm the district court's grant of summary judgment to appellants on this issue.

VII.

STANDING OF ENVIRONMENTAL GROUPS

The Natural Resources Defense Council, Inc., The Environmental Defense Fund, and various other environmental

organizations sought standing to raise the CZMA issues raised by the State of California and the local governments. The district court denied them standing because the CZMA was not enacted for their "especial benefit," and treated the briefs of these parties as amici curiae.[4] Citing two recent Supreme Court cases, *Middlesex County Sewerage Authority* v. *National Sea Clammers Association*, 453 U.S. 1, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981); and *California* v. *Sierra Club*, 451 U.S. 287, 101 S.Ct. 1775, 68 L.Ed.2d 101 (1981), the district judge held that these environmental groups had no implied right of action to bring claims under the CZMA. Assuming, *arguendo*, this holding is correct, it does not resolve the standing issue.

The environmental groups rely for standing not on an implied right of action under the CZMA, but on Section 10 of the Administrative Procedure Act (APA), 5 U.S.C. § 702. Addressing this point, the district court held that they may not rely on the APA as the sole jurisdictional predicate. In this the district court erred. The environmental groups relied on the APA for standing, not for federal subject matter jurisdiction. We hold that the environmental groups have standing under 5 U.S.C. § 702. No remand is necessary, however, because the erroneous denial of standing did not affect the outcome of the case.

We first note that federal court jurisdiction is based on 28 U.S.C. § 1331, for civil actions arising under the laws of the United States, and is not at issue in this case. Second, an implied right of action under the statute violated is not a necessary predicate to a right to action under the APA. *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 317, 99 S.Ct. 1705, 1725, 60 L.Ed.2d 208 (1979); *Glacier Park Foundation* v. *Watt*, 663 F.2d 882, 885 (9th Cir. 1981).

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[4] The district court dismissed the environmental groups and their claims from the lawsuit in a separate order of dismissal. *NRDC* v. *Watt*, 520 F.Supp. 1359 (C.D.Cal.1981) (order of dismissal).

Section 10 of the APA, 5 U.S.C.§ 702 provides:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

To have standing under this section both of the following questions must be answered affirmatively:

1. Has the party seeking standing suffered a legal wrong, or been adversely affected or aggrieved by the agency action (*i.e.*, has he been "injured in fact"), and,

2. Are the interests sought to be protected by the party seeking standing "arguably within the zone of interests to be protected or regulated" by the statute in question.

See Association of Data Processing Service Organizations v. *Camp*, 397 U.S. 150, 151-53, 90 S.Ct. 827, 829, 25 L.Ed.2d 184 (1970); *Barlow* v. *Collins*, 397 U.S. 159, 90 S.Ct. 832, 25 L.Ed.2d 192 (1970); *Glacier Park Foundation* v. *Watt*, *supra*, at 885.

A mere assertion of organizational interest in a problem, unaccompanied by allegations of actual injury to members of the organization, is not enough to establish standing. *Sierra Club* v. *Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1971); *Valley Forge Christian College* v. *Americans United for the Separation of Church and State, Inc.*, ___ U.S. ___, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982). Here, however, actual injuries to members have been alleged. The environmental groups claim that various of their members live, work, and enjoy recreational activities in the areas that will be affected by leasing of OCS tracts. They allege that their members' use of the coast and waters for commercial and sport fishing, scientific research, tourist activities, and recreation is threatened by OCS leasing. Injuries of a noneconomic nature to widely-share aesthetic and environmental interests, as well as economic injuries, can amount to sufficient "injury in fact" for standing under section 10. *Sierra Club* v. *Morton*, 405 U.S.

at 734, 92 S.Ct. at 1365, *cited with approval in United States* v. *SCRAP*, 412 U.S. 669, 686, 93 S.Ct. 2405, 2415, 37 L.Ed.2d 254 (1973); *Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970); *Cady* v. *Morton*, 527 F.2d 786 (9th Cir. 1975). Thus, the environmental groups' allegations establish sufficient "injury in fact" to permit an affirmative answer to the first question.

We also find that the alleged injuries are within the "zone of interests" to be protected by Section 307(c) of the CZMA. As already pointed out, section 307(c)(1) is part of a Congressional scheme to carry out the overall purpose of the CZMA, which is to protect the very resources the environmental groups claim are threatened. Congressional findings underlying the CZMA recognize "a national interest in the effective management [and] protection" of the coastal zone as well as in its development and beneficial use. Section 302(a), 16 U.S.C. § 1451(a). Congress expressed concern over the "loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use, and shoreline erosion" that has been "occasioned by population growth and economic development, including . . . extraction of mineral resources and fossil fuels." 16 U.S.C. § 1451(c). We agree with the finding in *American Petroleum Institute* v. *Knecht*, 456 F.Supp. 889 (C.D.Cal.1978), *aff'd*, 609 F.2d 1306 (9th Cir. 1979), that "[a]lthough sensitive to balancing competing interests, [the CZMA] was first and foremost a statute directed to and solicitous of environmental concerns." 456 F.Supp. at 919. Thus, the allegations of the environmental groups permit an affirmative answer also to the second question.

The CZMA issues the environmental groups sought to raise were identical to those raised by the State of California and the local governments, parties who clearly had standing. Additionally, amici curiae briefs were filed by the parties wrongly denied standing. Our review of the more than one thousand pages of the eighteen briefs filed in this case, as well as the extensive argument and our own research, convince us

that no stone was left unturned in presenting all aspects of the CZMA issue to this court. Allowing additional parties to present the same arguments would not affect the outcome of this case. Therefore, to remand the case for additional proceedings because of the district court's error with respect to standing would constitute a waste of scarce judicial resources.

AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART, AND STAYED IN PART.

APPENDIX B

United States District Court,
C. D. California.
Aug. 18, 1981.

Nos. CV 81-2080, CV 81-2081.

The STATE OF CALIFORNIA, acting By and Through Governor Edmund G. BROWN, Jr., the California Coastal Commission, the California Air Resources Board, the California Resources Agency, the California Department of Fish and Game, the California Department of Conservation, *Plaintiffs*,

v.

James G. WATT as Secretary of the Interior; the United States Department of Interior; Edward Hastey as Acting Director of the United States Bureau of Land Management; Robert Burford as Director Designate of the United States Bureau of Land Management, in his official capacity as Director when and if assumed; and the United States Bureau of Land Management, *Defendants*.

NATURAL RESOURCES DEFENSE COUNCIL, INC.; the Sierra Club; Friends of the Earth; Friends of the Sea Otter; and the Environmental Coalition on Lease Sale 53, *Plaintiffs*,

v.

James G. WATT, in his official capacity as Secretary of the United States Department of the Interior; the United States Department of the Interior; Ed Hastey, in his official capacity as Acting Director of the United States Bureau of Land Management; Robert Burford, Director-Designate of the United States Bureau of Land Management, in his official capacity as Director when and if assumed; and the United States Bureau of Land Management, *Defendants*.

On cross motions for summary judgment in suit brought by the state of California and agencies thereof alleging that the federal defendants had violated five federal statutes in offering for competitive bidding certain oil and gas leases on tracts located in the Santa Maria Basin, the District Court, Pfaelzer,

J., held that: (1) final notice of lease sale No. 53, pertaining to the offering of designated tracts of the outer continental shelf for mineral development, "directly affected" the California coastal zone and, therefore, the Secretary of the Interior had to conduct prelease activities relating to lease sale No. 53 in a manner which was, "to the maximum extent practicable," consistent with the California coastal management program, pursuant to the Coastal Zone Mangement Act; (2) any bids received for the tracts at issue were null and void as were any oil and gas leases for said tracts; but (3) defendants were entitled to summary judgment with respect to their claims arising under the Outer Continental Shelf Lands Act, the National Environmental Policy Act, the Endangered Species Act, and the Marine Mammal Protection Act.

Order in accordance with opinion.

George Deukmejian, Atty. Gen., N. Gregory Taylor, Asst. Atty. Gen., Theodora Berger and John A. Saurenman, Deputy Attys. Gen., Los Angeles, Cal., for plaintiffs State of California, acting by and through Governor Edmund G. Brown, Jr., the California Coastal Commission, the California Air Resources Board, the California Resources Agency, the California Department of Fish and Game, and the California Department of Conservation.

Carol E. Dinkins, Asst. Atty. Gen., Michael W. Reed, Peter R. Steenland, and Anne S. Almy, Attys., U.S. Dept. of Justice, Washington, D.C., Andrea Sheridan Ordin, U.S. Atty., Frederick M. Brosio, Jr., Asst. U.S. Atty., Chief, Civ. Div., and James R. Arnold, Asst. U.S. Atty., Los Angeles, Cal., for defendants James G. Watt, as Secretary of the Interior; the United States Department of the Interior, Edward Hastey as Acting Director of the United States Bureau of Land Management; Robert Burford as Director Designate of the United States Bureau of Land Management, in his official capacity as Director when and if assumed; and the United States Bureau of Land Management, in both cases.

E. Edward Bruce, Covington & Burling, Washington, D.C., for defendants in intervention ("WOGA") Western Oil and Gas Association, Atlantic Richfield Co., Chevron, U. S. A. Inc., Cities Service Co., Exxon Co., U. S. A., Getty Oil Co., Gulf Oil Corp., Mobil Oil Corp., Phillips Petroleum Co., Shell Oil Co., Sohio Petroleum Co., Tenneco Oil Co., and Texaco, Inc., in both cases.

Howard J. Privett, McCutchen, Black, Verleger & Shea, Los Angeles, Cal., William C. Miller and Donald E. Peterson, Pillsbury, Madison & Sutro, San Francisco, Cal., for defendant in intervention Chevron, U. S. A., Inc., in both cases.

Donatas Januta, Irwin D. Karp, Boyd, Januta & Karp, San Francisco, Cal., for plaintiffs in intervention, Local Governments, County of Humboldt, County of Marin, County of Mendocino, County of Monterey, County of San Luis Obispo, County of San Mateo, County of Santa Barbara, County of Santa Clara, County of Santa Cruz, County of Sonoma, City of Brisbane, City of Los Angeles, City of San Luis Obispo, City of Santa Cruz, City of Santa Monica and City of Seaside, in both cases.

Donald L. Clark, County Counsel, Lloyd M. Harmon, Jr., Chief Deputy County Counsel, Phillip L. Kossy, Deputy County Counsel, San Diego, Cal., for plaintiff in intervention County of San Diego, in both cases.

Trent W. Orr, Natural Resources Defense Council, Inc., San Francisco, Cal., Julie E. McDonald, Sierra Club Legal Defense Fund, Inc., San Francisco, Cal., for plaintiffs Natural Resources Defense Council, Inc., the Sierra Club, Friends of the Earth, Friends of the Sea Otter and the Environmental Coalition on Lease Sale 53, in both cases.

OPINION

PFAELZER, District Judge.

I. BACKGROUND

Plaintiffs in this case are the State of California, the California Coastal Commission (hereinafter referred to as "CCC"), the California Air Resources Board, the California Resources Agency, the California Department of Fish and Game, and the California Department of Conservation. (This case is hereinafter referred to as *California* v. *Watt*.) The Natural Resources Defense Council, Inc. (hereinafter referred to as "NRDC"), the Sierra Club, the Friends of the Earth, the Friends of the Sea Otter, and the Environmental Coalition on Lease Sale 53 (hereinafter collectively referred to as "environmental groups") are plaintiffs in the companion case. The plaintiffs in the companion case are associations who claim an interest in the coastal zone and its resources. (The companion case is hereinafter referred to as *NRDC* v. *Watt*.)

Intervening as plaintiffs in the case of *California* v. *Watt* are certain cities and counties of the State of California which are located on, or in proximity to, the California coast. The plaintiff-intervenors are County of Humboldt, County of Marin, County of Mendocino, County of Monterey, County of San Diego, County of San Luis Obispo, County of San Mateo, County of Santa Barbara, County of Santa Clara, County of Santa Cruz, County of Sonoma, City of Brisbane, City of Los Angeles, City of San Luis Obispo, City of Santa Cruz, City of Santa Monica, and City of Seaside (collectively referred to as "local governments").

The defendants are James G. Watt (the "Secretary"), acting in his official capacity as Secretary of the Interior, the Department of Interior, Robert Burford, acting in his offical capacity as Director of the Bureau of Land Management, and the Bureau of Land Management ("BLM").

Intervening as defendants in both actions are Western Oil and Gas Association ("WOGA"), Amoco Production Company,

Atlantic Richfield Company, Cities Service Company, Conoco, Inc., Exxon Corporation, Elf Aquitaine Oil and Gas, Getty Oil Company, Gulf Oil Corporation, Phillips Petroleum Company, and Shell Oil Company. WOGA is a regional trade association of companies and individuals in the petroleum industry. The remaining defendant-intervenors are oil companies which submitted high bids on one or more tracts offered in Lease Sale No. 53 on May 28, 1981.

Lease Sale No. 53 consists of a maximum offering of 243 designated tracts of the Outer Continental Shelf ("OCS") for mineral development. The tracts in Lease Sale No. 53 lie in five different basins off the coast of California—one of which is the Santa Maria Basin. That basin extends generally from Point Sur in Monterey County in the north to Point Conception in Santa Barbara County in the south.

Requesting injunctive and declaratory relief, plaintiffs claim that defendants have violated five federal statutes in offering for competitive bidding certain oil and gas leases on tracts located in the Santa Maria Basin. This Court has jurisdiction over the claims asserted herein pursuant to 28 U.S.C. § 1331 (Federal question jurisdiction); 28 U.S.C. §§ 2201-2202 (Declaratory Judgment Act); 28 U.S.C. § 1361 (Mandamus); 5 U.S.C. §§ 701-706 (Administrative Procedure Act); 43 U.S.C. §§ 1349(a)(1), (b)(1) of the Outer Continental Shelf Lands Act ("OCSLA"); the Coastal Zone Management Act ("CZMA"), 16 U.S.C. § 1451 *et seq.*; the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*; the Endangered Species Act ("ESA"), 16 U.S.C. § 1540(a)(1), (b)(1); and the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. § 1361 *et seq.*

There are no material issues of genuine fact in dispute in these two consolidated cases.

The following is a chronology of the events relating to the lease sale at issue in the two cases.

In November 1977, BLM issued a Call for Nominations for Lease Sale No. 53. The Call requested the petroleum industry to designate specific tracts on which it was interested in

bidding if a sale were held. It also asked federal, state and local governments, universities, environmental organizations, research institutions, and the public to identify specific tracts which they believe should be excluded from leasing or should be leased under particular restrictions due to conflicting resource values or environmental factors.

In October 1978, the Department of Interior announced the tentative tract selection for Lease Sale No. 53. The Santa Maria Basin contained 115 of the 243 tracts to be involved in the sale.[1]

A draft environmental impact statement ("DEIS") was released for public comment in April 1980. The DEIS, which analyzed the environmental impacts in the five basins to be included in Lease Sale No. 53, was based on a resource estimate of 404 million barrels for the Santa Maria Basin.

On July 8, 1980, the California Coastal Commission requested that the Secretary submit a consistency determination at the time of the issuance of the proposed notice of sale.

In September 1980, a final environmental impact statement (the "EIS") was released. Shortly before its publication, on or about August 28, 1980, the United States Geological Survey ("USGS") made available revised resource estimates for the Santa Maria Basin in the amount of 794 million barrels of oil. The revised estimate, which almost doubled the previous estimate, was incorporated in an addendum to the EIS.

Also during the fall of 1980, BLM consulted with the National Marine Fisheries Service ("NMFS") and the Fish and Wildlife Service ("FWS") concerning the jeopardy posed to any endangered or threatened species by Lease Sale No. 53. The NMFS rendered a biological opinion that Lease Sale No. 53 would not jeopardize the endangered gray whale. The FWS

[1] Although 243 tracts were originally to be considered for proposed Lease Sale No. 53, BLM later established that the total sale area would involve 242 tracts comprising 1.315 million acres.

rendered a biological opinion that the sale would not jeopardize the threatened sea otter.

During this period, a Secretary Issue Document ("SID") was prepared by the Department of Interior. An SID is an internal document intended to aid the Secretary in making decisions concerning lease sales. The Department of Interior released the SID for Lease Sale No. 53 in October 1980.

On October 16, 1980, former Secretary of the Interior Cecil D. Andrus issued the proposed notice of sale for Lease Sale No. 53. The notice proposed leasing only within the Santa Maria Basin. Secretary Andrus deleted the four other basins from the proposed sale.

By letter of October 22, 1980, the Department of Interior notified the CCC of its "negative determination" that the preleasing activities associated with Lease Sale No. 53 had no "direct effects" on California's coastal zone. In response to the negative determination, on December 16, 1980, the CCC adopted a resolution that the deletion of 31 tracts (29 tracts in the final notice of sale) in the northern portion of the Santa Maria Basin was necessary in order for Lease Sale No. 53 to be consistent with the California Coastal Management Plan ("CCMP"). (As 4 of the tracts were combined as 2 for sale purposes, the CCC resolution is actually directed to 29 tracts.)

On December 24, 1980, the Governor of California, Edmund G. Brown, Jr., responding to Secretary Andrus' proposed notice of sale, recommended the deletion of 34 tracts located in the northern portion of the Santa Maria Basin. (Although the recommendation referred to 34 tracts, 4 of the tracts were combined as 2 tracts for sale purposes; therefore, only 32 tracts were actually encompassed by the Governor's recommendation.) Governor Brown's letter and enclosed recommendations were subsequently transmitted to the new Secretary of the Interior Watt by a memorandum from Deputy Assistant Secretary Heather L. Ross.

On February 10, 1981, Secretary Watt issued a revised proposed notice of sale for Lease Sale No. 53. The four basins

previously deleted from the proposed sale were once more included in the sale. The revised notice continued to propose leasing in the Santa Maria Basin. In transmitting the revised proposed notice to Governor Brown, Secretary Watt requested recommendations pursuant to § 19 of OCSLA, 43 U.S.C. § 1345.

By letter dated April 7, 1981, Governor Brown submitted his recommendations concerning the revised Lease Sale No. 53. He reiterated his position that, based upon the balancing test of § 19 of OCSLA, the northern 32 tracts should be deleted from the sale. Enclosed with the letter detailing Governor Brown's recommendations were comments and recommendations from various state agencies and local governments in California.

On April 10, 1981, the Department of Interior issued a news release in which Secretary Watt announced that he planned to divide Lease Sale No. 53 into two sales, with the sale of the tracts in the Santa Maria Basin to be held in May 1981 and the sale of the remaining tracts to be postponed. The Secretary stated that his decision to lease the entire Santa Maria Basin was based on a finding of overriding national interest. The final notice of sale for Lease Sale No. 53, Santa Maria Basin, was published on April 27, 1981.

By letter dated May 1, 1981, Secretary Watt notified Governor Brown of the rejection of California's recommendations concerning the lease sale in the Santa Maria Basin. In the communication sent to Governor Brown, Secretary Watt provided a brief explanation of the basis for his previous rejection of the recommendation.

Between the Call for Nominations on OCS Lease Sale No. 53 in November 1977 and May 1, 1981, the State of California, its agencies and the local governments submitted to the Department of Interior more than 20 separate communications seeking the deletion or delay of the sale of tracts in the Santa Maria Basin. Excluding the call for nominations and the letter of May 1, the Department of Interior submitted at least three

separate communications to the state or to the CCC in regard to the disputed tracts within Lease Sale No. 53.

On April 29, 1981, plaintiffs in *California* v. *Watt* and in the companion case of *NRDC* v. *Watt* filed this action. On May 27, 1981, the Court granted a preliminary injunction in *California* v. *Watt*. Subsequently, on July 10, 1981, the consolidated cases came on for hearing on cross motions for summary judgment.

With respect to the CZMA, 29 tracts in the northern portion of the Santa Maria Basin are at issue. (Due to the consolidation of 4 tracts into 2, the 31 tracts, as initially identified by Secretary Andrus in the October 1980 notice of sale, were viewed as 29 tracts at the time of the April 1981 final notice of sale.) The 29 tracts, numbered 129 to 155 and 158 to 161, range seaward from 3 miles to approximately 24 miles and lie in an area in which the water depths range from 50 to 750 meters (162 to 2,437 feet). *See* Administrative Record No. 511w (U.S. Dept. of Interior, BLM Memorandum, June 4, 1981 at 3); Environmental Impact Statement ("EIS"). Vol. 1 at 1-9. Tract numbers 130, 131, 133, 134, 136 to 138, 140 to 151, 153 to 155, 160 and 161 are within 12 miles of the coastline. *See* Defendant's Exhibit L-G at 289-90 (letter from the State of California's Department of Fish and Game to the Resources Agency of the State of California). Administrative Record No. 511w (U.S. Dept. of Interior, BLM Memorandum, June 4, 1981 at 3); Administrative Record No. 411w (California Coastal Comm. Letter, April 8, 1981 at 2); Administrative Record No. 165w (CCC Comments on the Draft Environmental Impact Statement ("DEIS") on Proposed OCS Lease Sale #53, June 4, 1980 at 2); Administrative Record No. 158w (U.S. Dept of Interior, BLM Press Release, May 9, 1980); EIS at 1-10. Of these tracts, numbers 138, 142, 143, 146, 147 and 151 are within 6 miles of the shore, EIS at 2-18; SID at 73; portions of tract numbers 130, 131, 134, 137, 141, 144, 145, 149, 150, 154, 155, 160 and 161 are within 6 nautical miles of the shore, EIS at 2-18, 2-19; Defendant's Exhibit L-G at 292-93, letter from the Department of Parks and Recreation to the U.S. Dept. of Interior, Office of Planning and Research. The remaining tracts,

numbers 129, 132, 135, 139, 148, 152, 158 and 159 range seaward from approximately 12.5 to 24 miles. *See* Administrative Record No. 511w (U.S. Dept. of Interior, BLM Memorandum, June 4, 1981 at 3).

With respect to the other statutes, NEPA, OCSLA, ESA and MMPA, three additional tracts are in dispute. They are numbered 162 to 164. They also range seaward from 3 miles to approximately 24 miles and lie in an area in which the water depths range from 50 to 750 meters (162 to 2,437 feet). Administrative Record No. 511 (U.S. Dept. of Interior, BLM Memorandum, June 4, 1981 at 3); EIS, Vol. 1 at 1-9.

II. THE COASTAL ZONE MANAGEMENT ACT

A. The Issue Presented

Plaintiffs in this case contend that the Final Notice of Lease Sale No. 58 "directly affects" the California coastal zone and, therefore, the Secretary of the Interior must conduct the prelease activities relating to Lease Sale No. 53 in a manner which is, "to the maximum extent practicable", consistent with the California Coastal Management Program (CCMP), pursuant to § 307(c)(1) of the CZMA. 16 U.S.C. § 1456(c)(1). Thus, the principal issue in this case with respect to the CZMA is whether the Secretary violated that Act by making a "negative determination" that no consistency review was required for the Final Notice of Lease Sale No. 53. *Id.*; 15 C.F.R. §§ 930.34-.35

The threshold test for the application of § 307(c)(1) is whether the activity in question will have a "direct effect" on the coastal zone. If a federal agency determines that its proposed activity *will not* directly affect the state's coastal zone, it must provide the administrator of the state coastal program with written notice briefly setting forth the reasons for that conclusion. 15 C.F.R. § 930.35(d) (1980). That notice is called a "negative determination". *Id.* On the other hand, if a federal agency determines that the activity in question *will* directly affect the coastal zone, the federal agency must provide the

administrator of the state coastal program with a written notice, called a "consistency determination", that the activity will be carried out in a manner which conforms with the state program. 15 C.F.R. § 930.34(a) (1980).

The issue is squarely presented in this case of first impression: does the Final Notice of Lease Sale with respect to the 29 tracts in the northern portion of the Santa Maria Basin directly affect the coastal zone of the State of California? The resolution of this issue turns on an interpretation of the phrase "directly affect" as it is used in the CZMA.

Established rules of statutory construction require that the Court turn first to the "language in which the act is framed, and if that is plain, . . . to enforce it according to its terms." *Caminetti* v. *United States*, 242 U.S. 470, 485, 37 S.Ct. 192, 194, 61 L.Ed. 442 (1917). If the meaning of the statutory text is clear and unambiguous, the Court's task is minimal. That is not the case here as the language of § 307(c)(1) is neither clear nor unambiguous.[2] The Act itself provides no definition of the key terms employed in the section. Thus, in order to construe and interpret § 307(c)(1), the Court is required to turn to the Act's stated purposes, the legislative history, and the interpretations of agencies charged with administering the Act.

B. The Statutory Purpose

Effectuating the purpose of a statute should be a primary concern of a court in construing the meaning of disputed language within it. *Philbrook* v. *Glodgett*, 421 U.S. 707, 713, 95

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[2] During the 1980 Oversight Hearings held before the House Subcommittee on Oceanography, Chairman Gerry E. Studds remarked, "I think particularly that sections 307 and 308 challenge anyone whose native tongue is English to discern what Congress had in mind when it wrote those sections." Proposed Amendments to the CZMA: Hearings on H.R. 6956 and H.R. 6979 before the Subcommittee on Oceanography of the House Committee on Merchant Marine & Fisheries, 96th Cong., 1st and 2d Sess. 88 (1980).

S.Ct. 1893, 1898, 44 L.Ed.2d 525 (1975), quoting *United States* v. *Heirs of Boisdoré*, 8 How. 113, 122, 12 L.Ed. 1009 (1849). Further, a court should not ignore policy considerations in favor of mechanical interpretation in seeking the proper construction of a statute. *United States* v. *Curtis-Nevada Mines, Inc.*, 611 F.2d 1277, 1280 (9th Cir. 1980), citing to *United States* v. *Anderson*, 76 U.S. 56, 65-66, 19 L.Ed. 615 (1869). Thus, the question of which activities fall within the scope of 307(c)(1) must be considered in light of the statutory purpose of the CZMA.

The CZMA was enacted in order to provide comprehensive, coordinated planning for the protection and beneficial use of the resources of the coastal zone. 16 U.S.C. §§ 1451, 1452. Special emphasis was placed on the objective of preserving the natural resources within this area "for this and succeeding generations". 16 U.S.C. § 1452(1). In enacting the CZMA, Congress intended to establish an effective scheme for the long-term management of the valuable resources found within the coastal zone of the United States.

The "key" to the management scheme envisioned by Congress is "to encourage the states to exercise their full authority over the lands and waters in the coastal zone". 16 U.S.C. § 1451(i). This authority granted to the states is to be exercised "in cooperation with Federal and local governments and other vitally affected interests". *Id.* Thus, the primary authority in the management scheme is to be bestowed upon those coastal states which develop and implement comprehensive management programs for their respective coastal areas.

While the Act assigns final responsibility for management to states with such a program, the federal agencies are given significant power over the policy choices which a state incorporates into its coastal management plan. Under the Act, the Secretary of Commerce may not give the required approval to the state's proposed plan "unless the views of Federal agencies principally affected by such program have been adequately considered". 16 U.S.C. § 1456(b). Another

prerequisite for the approval of the Secretary of Commerce is a finding that the state's program "provides for adequate consideration of the national interest". 16 U.S.C. § 1455(c)(8).

To induce the states to develop and implement comprehensive management programs in accord with the views of federal agencies, Congress provided that federal activities are to be consistent with the approved state management program.[3] To this end, Congress designated five categories of federal actions which are subject to the requirement of a consistency review.

The consistency provisions under the CZMA, each subjecting particular categories of federal actions to review, are: (1) federal activities, conducted or supported by a federal agency, which directly affect the coastal zone; (2) federal development projects in the coastal zone; (3) activities of applicants for federal licenses or permits where the proposed activities will affect land and water uses in the coastal zone; (4) OCS post-lease sale activities which require a federal license or permit and will affect any land use or water use in the coastal zone; and (5) federal programs which provide funding to state and local governments for projects which will affect the coastal zone §§ 307(c)-(d), 16 U.S.C. §§ 1456(c)-1456(d). Administrative procedures have been established to facilitate the implementation of the consistency requirements under the Act.[4]

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[3] Linsley, Federal Consistency and Outer Continental Shelf Oil and Gas Leasing, 9 Boston C. Envt'l Affairs L.Rev. 429, 433 (1981).

[4] The federal agency makes an initial determination whether its activity "directly affects" the coastal zone. 15 C.F.R. § 930.33(a) (1980). The federal agency must evaluate its activity in light of the provisions of the state's coastal management program. 42 Fed.Reg. 43,590 (1977). If the federal agency determines that the activity will directly affect the coastal zone, it must provide the state with a "consistency determination", which indicates whether the proposed activity will be undertaken in a manner which conforms with the state program. 15 C.F.R. §§ 930.34(a), 930.39. If the federal agency determines instead that the activity has no direct effects upon the coastal zone, it must provide the state with a "negative determina-

Obviously, one incentive for state participation in a federal coastal management program is the federal funding for the program. 16 U.S.C. §§ 1454, 1455. The grants, however, are of limited duration. Thus, in reality, the requirement of consistency review is the principal permanent inducement to the state's development of a coastal management plan. There is therefore a *quid pro quo* in the legislative scheme:[5] the state agencies are to participate actively in designing the state management program, and, in return, the federal agencies "*shall* conduct" their activities "in a manner which is, to the maximum extent possible, consistent" with the state's program. 16 U.S.C. § 1456(c) (emphasis added).

The management program created under the CZMA is intended to be comprehensive. Congress intended that federal-state consultation procedures extend to all phases of the management of coastal resources. To be considered during consultation are such issues as the orderly siting of energy facilities, including pipelines, oil and gas platforms, and crew and supply bases, and the minimization of geological hazards. 16 U.S.C. §§ 1452(2)(B)-(C), 1453(6). Directing the coastal states to identify potential problems with respect to marine and coastal areas and to prevent unavoidable losses of any valuable environmental or recreational resource as a result of "ocean energy activities", Congress intended that the states be involved at the initial stages of decision-making related to the coastal zone. 16 U.S.C. §§ 1456a(c)(3); 1456b(a). The Act requires that the coastal state's management program include a "planning process for energy facilities likely to be located in, or which may significantly affect, the coastal zone, including, but not limited to, a process for *anticipating and managing*

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tion". *Id.* § 930.35(d). Mediation is available in the event that the federal agency and the state disagree as to the propriety of a negative determination or the validity of a consistency determination. *Id.* §§ 930.110-115. *See Linsley, supra*, at 438-440.

[5] Schoenbaum & Parker, Federalism in the Coastal Zone, 57 N.C.L.Rev. 231, 239 (1979).

impacts from such facilities". § 1454(b)(8) (emphasis added). In order to anticipate impacts and prevent unnecessary losses in the coastal zone, it is manifest that the consultation process was intended to begin at the earliest possible time.

Any interpretation of the phrase "directly affect" must give due consideration to the reciprocal roles intended to be assigned to federal agencies and to the states. The states are intended to have a significant role in essential planning and coordination for the development of the coastal zone. They are intended to be involved in every stage of the planning from drawing board to execution.

Special grants are offered to induce the states to create federally-approved comprehensive management plans which provide for inter-governmental cooperation. California designed and created such a plan.[6] It would be anomalous to impute to the Congress which induced the states to formulate these plans an intention to permit the federal government to proceed with critical decision-making in total disregard of them. Congress can hardly have had such an intent. The CZMA was purposely designed to encourage cooperation between federal, state and local governments rather than conflict, and it should be construed in a manner which will effectuate that purpose.

Pre-leasing activities, including the call for nominations, the publication and circulation of an environmental impact statement, and the publication of a final notice of lease sale, define and establish the basic parameters for subsequent development and production. During the pre-leasing stage, which culminates in the final notice of lease sale, critical decisions are made as to the size and location of the tracts, the timing of the

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[6] The California Coastal Management Program ("CCMP") is the program adopted by California pursuant to the CZMA. *See American Petroleum Institute* v. *Knecht*, 456 F.Supp. 889 (C.D.Cal.1978).

sale and the stipulations to which the leases are subject.[7] Each of these are key Outer Continental Shelf (hereinafter referred to as the OCS) planning decisions. The selection of tracts to be let determines where the lessee can explore and produce oil and gas. The decision to offer or delete various tracts also determines which estuaries, reefs, wetlands, beaches, or barrier islands are exposed to the risk of oil spills and which are not. The particular stipulations imposed on the lessors, along with the designated location of the tracts, influence the flow of vessel traffic, the placement of platforms and drilling structures, as well as the siting of on-shore construction. Stipulations included in the lease determine what equipment is to be used and what training is to be provided by lessees to those working on the tracts. In addition, decisions made during the pre-leasing stage establish the timing of OCS development and production.[8] Thus, the leasing sets in motion the entire chain of events which culminates in oil and gas development.

The purpose of the act would not be furthered by excluding the states from the critical decision-making relating to oil and gas resources in the OCS. If the state is consulted only after the plans are drawn and the parameters for exploration and development are set, as a practical matter, it will be relegated to the defensive role of objecting to the proposals of individual lessees as they are presented. Thus, the comprehensive planning in accordance with the management plan cannot occur and there will be no opportunity for the orderly decision-making envisioned by the draftsmen of the CZMA.

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[7] Absent special circumstances, no tract leased on the OCS is to exceed 5,760 acres. 43 U.S.C. § 1337(b)(1). The lessee is entitled to explore, develop and produce the oil and gas found within the area of that tract.

[8] The original lease is valid for a period of 5 to 10 years. 43 U.S.C. § 1337(b)(2).

C. The Legislative History Of The CZMA

The legislative history, while somewhat inconclusive, sheds some light on the Congressional intent in enacting this provision. As the Act was first passed in 1972, amended in 1976 and in 1980, Congress has had ample opportunity to debate the legislation. The text of § 307(c)(1) in the original bill, as passed by both House and Senate, provided that all federal activities "in the coastal zone" were subject to § 307(c)(1). Without explanation, the Conference Committee altered the language and substituted the phrase "directly affecting the coastal zone" for "in the coastal zone". On balance, this substitution seems to have been intended to expand the scope of the provision. Activities occurring outside of the coastal zone, such as OCS activities, as well as activities within the coastal zone, were made subject to consistency review. A caveat, however, was appended to the revision. In order to be subject to consistency review, the effect must be "direct". The 1972 legislative history is silent as to the import of this change.

In 1976 Congress amended the CZMA. Coastal Zone Management Act Amendments of 1976, Pub.L.No.94-370, 90 Stat. 1013 (1976) (amending 16 U.S.C. §§ 1451-1464). Section 307(c)(1) was not amended, and the legislative history of the 1976 amendments does not address this particular provision. However, there are references within the legislative history to the question of the applicability of consistency requirements to the decision to lease. Certain statements relate to the purpose of the Act as a whole. The Senate Report expressed concern that "[t]here is very little coordination or communication between Federal agencies and the affected coastal states prior to major energy resource development decisions, such as the decision to lease large tracts of the OCS for oil and gas . . . . Full implementation of the Coastal Zone Management Act of 1972 . . . could go far to institute the broad objectives of Federal-State cooperative planning envisioned by the framers of the act". S.Rep.No.94-277, 94th Cong., 2d Sess. 3, *reprinted in* [1976] U.S.Code Cong. & Ad.News 1770.

During its consideration of the 1976 Amendments, Congress did address a different subsection within the same section of the 1972 Act—307(c)(3), now § 307(c)(3)(A). That subsection requires that applicants for a federal permit or license for an activity affecting the coastal zone include in the application a certification of consistency of the proposed activity with the state's coastal management program. Both the House and the Senate concluded that Congress had intended that the "consistency clause" (*i.e.*, § 307(c)(3)) in the 1972 act apply to Federal leases for offshore oil and gas. S.Rep.No.94-277, *supra*, 19-20, 36-37, 53-54, 59; H.R. Rep.No.94-878, 94th Cong., 2d Sess. 4, 52-53, 67-68. Nevertheless, by amendment on the floor of the House, the explicit requirement of consistency certification for offshore leasing was deleted from § 307(c)(3). 122 Cong.Rec. 6128. The final version of § 307(c)(3) imposed no consistency certification requirement on the lessee.

Defendants infer from the Congressional decision to exclude leasing from the consistency certification process under § 307(c)(3) an intention to exclude pre-leasing activities from all consistency review. They assert that § 307(c)(3) supersedes § 307(c)(1). Thus, defendants read the Congressional silence as to the continuing validity of § 307(c)(1) as a repeal by implication.

The Supreme Court has consistently applied the "cardinal rule . . . that repeals by implication are not favored". *Morton* v. *Mancari*, 417 U.S. 535, 549-551, 94 S.Ct. 2474, 2482-2483, 41 L.Ed.2d 290 (1974); *Wood* v. *United States*, 16 Pet. 342-343, 363, 10 L.Ed. 987 (1842). In the absence of an affirmative showing of an intention to repeal, effect must be given to each section of the statute. *Id.* Where there is no "positive repugnancy" between the two provisions, the subsequently enacted provision does not repeal the previously enacted provision. *United States* v. *Borden Co.*, 308 U.S. 188, 198-99, 60 S.Ct. 182, 188, 84 L.Ed. 181 (1939).

There is no "repugnancy" between § 307(c)(1) and 307(c)(3). The former subsection imposes obligations on the federal

government which in the present context is the lessor, whereas the latter subsection imposes obligations on private sector applicants for a federal license or permit, which in the present context are the lessees. Certainly the legislative history for the 1976 Amendments does not imply any intention to make § 307(c)(3) the exclusive mode of invoking consistency review. Under § 307(c)(3), consistency requirements are imposed on the specific activities relating to permits and licenses, whereas under § 307(c)(1), consistency requirements are imposed on a residual category of federal actions which are neither development projects nor related to permits and licenses. 15 C.F.R. § 930.31 (1980); *see* 44 Fed.Reg. 37,146 (1979) (NOAA's comment to 15 C.F.R. § 930.31 (1979)).

In 1980, Congress reauthorized the CZMA. Coastal Zone Management Improvement Act of 1980, Pub.L.96-464, 94 Stat. 2060 (1980). Congress amended certain sections of the Act, but did not alter any of the section 307 consistency provisions. Both the House and Senate Committees acknowledged the existence of a disagreement over the applicability of the consistency provisions to the final notice of OCS lease sale.[9] In order to clarify the intent of these provisions, the House Committee explained in its report accompanying the 1980 amendments that the 1976 amendments to § 307 "did not alter Federal agency responsibility to provide States with a consistency determination related to OCS decisions which preceded issuance of leases".[10] H.R.Rep.No.96-1012, 96th Cong., 2d

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[9] "The committee is cognizant of one disagreement between California and the Department of Interior which led to a resolution effort through formal mediation proceedings conducted by the Department of Commerce". H.Rep. R.No.96-1012, 96th Cong., 2d Sess. 34, *reprinted in* [1980] U.S.Code Cong. & Ad.News 4382. *See also* S.Rep. No. 96-783, 96th Cong., 2d Sess. 11.

[10] There was no conference report on the Coastal Zone Management Improvement Act of 1980. After the language of the Senate bill was amended to contain the text of the House bill, the Senate bill was passed in lieu of the House bill. [1980] U.S.Code Cong. & Ad.News

Sess. 28, *reprinted in* [1980] U.S.Code Cong. & Ad.News 4376. The Senate Committee specifically discussed the relationship between section 307(c)(1) and OCS pre-lease activities:

> The Department of the Interior's activities which preceded lease sales were to remain subject to the requirements of section 307(c)(1). As a result, intergovernmental coordination for purposes of OCS development commences at the earliest practicable time in the opinion of the Committee, as the Department of the Interior sets in motion a series of events which have consequences in the coastal zone.

S.Rep.No.783, 96th Cong.2d Sess. 11 (1980).

The 1980 Congress also recognized the uncertainty that had arisen concerning the interpretation of the threshold test of "directly affecting" the coastal zone. H.R.Rep.No.96-1012, 96th Cong., 2d Sess. 34-35, *reprinted in* [1980] U.S.Code Cong. & Ad. News 4382-83. Referring to earlier congressional deliberations, the House Committee presented two alternative definitions of the phrase "directly affecting". The threshold test applies "whenever a Federal activity ha[s] a functional interrelationship from an economic, geographic or social standpoint with a State coastal program's land or water use policies". *Id.* at 34, U.S. Code Cong. & Admin.News at 4382. As an alternative phrasing of the threshold test, the House Committee stated that the Federal consistency requirements should apply "when a Federal agency initiates a series of events of coastal management consequence". *Id.* Congress indicated its support of an "expansive interpretation of the threshold test". *Id.* at 35, U.S.Code Cong. & Admin.News at 4383. In order to effectuate the purposes of the Act, consulta-

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4362. Under these circumstances, the House Report should be accorded greater weight than might be appropriate if there were a more authoritative source from which to glean the intent of the legislature as a whole. *See* D. Sands, 2A Sutherland Statutory Construction § 48 (1973).

tion between federal and state agencies should occur "at the earliest practicable time". *Id.* at 34, U.S.Code Cong. & Admin. News at 4382; *see also* S.Rep.No.783, *supra*.

Defendants contend that the 1980 legislative history is not entitled to great weight. They argue that, in interpreting the intent of the body which enacted the statute, no deference is due to statements of a "post-enactment Congress". In support of this view, defendants cite a frequently quoted dictum: "[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one". *United States* v. *Price*, 361 U.S. 304, 313, 80 S.Ct. 326, 331, 4 L.Ed.2d 334 (1960).

The present situation is readily distinguishable from that in *United States* v. *Price*. There the inferences of legislative intent did not flow from explicit Congressional statements, but from Congressional inaction on amendatory legislation. The sole passing reference by Congress to the disputed provision was characterized by the court in *United States* v. *Price* as "a slender reed". *Id.* at 313, 80 S.Ct. at 332. In contrast, the recent legislative history of the CZMA contains statements of great significance from both houses of Congress.

While subsequent legislative history generally is not controlling, neither should subsequent congressional interpretation be "rejected out of hand". *Andrus* v. *Shell Oil Co.*, 446 U.S. 657, 666 n.8, 100 S.Ct. 1932, 1938, 64 L.Ed.2d 593 (1980). While acknowledging that the admonition propounded in *United States* v. *Price* remains sound, the Supreme Court explained in *Andrus* that a court should nevertheless give appropriate weight to arguments predicated upon congressional actions. *Id.* The court should not overlook valuable sources in the search for legislative intent. *See Walt Disney Productions* v. *United States*, 480 F.2d 66, 68 (9th Cir. 1973), *cert. denied*, 415 U.S. 934, 94 S.Ct. 1451, 39 L.Ed.2d 493 (1974).

Here, the 1980 legislative history has special relevance. In reauthorizing the 1972 Act, Congress made explicit references

to the provision in dispute, as well as to the very phrase within the disputed provision. This Court is bound to give careful consideration to the explicit statements made by the 1980 Congress during its reauthorization of the CZMA.

Only a definition which provides for the application of § 307(c)(1) at the decision-making stage of the leasing process will effectuate the congressional intent and give proper meaning and focus to the Act. Clearly, the consistency requirement should apply when a federal agency initiates a series of events which have consequences in the coastal zone. Any other interpretation would thwart the purposes of the Act.

D. Interpretation By Reference To Related Statutes

The defendants argue that the Secretary's obligations under § 307(c)(1) must be interpreted in light of his obligations under OCSLA, as well as under NEPA and ESA. An expansive interpretation of the Secretary's duties under § 307, according to defendants, would create a conflict with the functions and purposes of the other applicable statutes affecting the OCS.

As to the relationship between OCSLA and the CZMA, defendants contend that to impose the requirement of consistency review on pre-leasing activities would nullify § 19 of OCSLA which provides for the Secretary's consideration of recommendations submitted by a state governor. 43 U.S.C. § 1345. Defendants explain that the scheme of regulation of the OCS as set forth in the 1978 Amendments of OCSLA, Pub.L.No.95-372, 92 Stat. 629 (1978), accords the Secretary the authority to direct development of the OCS. In defendants' view, the construction of the CZMA urged by plaintiffs would result in a substitution of the state's judgment for the Secretary's, contrary to the intent of Congress as expressed in the amendments to OCSLA. Therefore, defendants urge the Court to give "overriding weight" to § 19 of OCSLA in construing § 307 of the CZMA.

At the outset, it should be noted that the CZMA has certain unique objectives which set it apart from the other statutes

relied upon by defendants. NEPA, OCSLA, ESA, and the CZMA share the common goal of preserving and protecting the nation's resources.[11] Only the CZMA was intended to encourage active participation of state and local governments in developing and implementing the plans for meeting the common goal.[12] In the remaining statutes, Congress imposes certain responsibilities on the federal government and federal agencies without mandating participation by the states into the statutory scheme.

Although both the CZMA and OCSLA focus on offshore oil and gas leases, there is a marked difference in the central focus of each statute. *Massachusetts* v. *Andrus*, 594 F.2d 872 (1st Cir. 1979). Under OCSLA, the emphasis is upon development of oil, gas and other minerals. In contrast, the CZMA is a

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[11] the CZMA was enacted by Congress "to preserve, protect, develop, and, where possible, to restore or enhance, the resources of the Nation's coastal zone." 16 U.S.C. § 1452(a).

OCSLA directs the Secretary of the Interior to prescribe rules and regulations deemed "necessary and proper in order to provide for the prevention of waste and conservation of the natural resources of the Outer Continental Shelf, and the protection of correlative rights therein." 43 U.S.C. § 1334(a)(1).

NEPA recognizes that "each person has a responsibility to contribute to the preservation and enhancement of the environment". 42 U.S.C. § 4331(c). *See also* 42 U.S.C. § 4331(b). Principal purposes of the ESA are "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such endangered species and threatened species". 16 U.S.C. § 1531(b).

[12] *See* 16 U.S.C. § 1452. As one commentator observed, the CZMA "reflects a strong congressional intent to give states and their delegates a more significant management role than the national government". Finnell, Federal Regulatory Role in Coastal Land Management, 1978 American Bar Foundation Research Journal 173, 249-250.

statute directed to, and solicitous of, environmental concerns. *American Petroleum Institute* v. *Knecht*, 456 F.Supp. 889, 919 (C.D.Cal.1978), *aff'd*, 609 F.2d 1306 (9th Cir. 1979). Due to this significant difference in objectives between CZMA and the other statutes, it is doubtful that it would be proper to interpret the CZMA in light of the other statutes.

Obviously, the court must construe federal statutes so that they are consistent with each other, as by this means congressional intent can be given its fullest expression. *Get Oil Out! Inc.* v. *Exxon Corp.*, 586 F.2d 726, 729 (9th Cir. 1978). If particular statutory provisions can be construed to be in harmony with each other, it is unnecessary to accord "overriding weight" to a single provision. Therefore, the court must examine to what extent § 19 of OCSLA imposes duties which conflict with the consistency requirements under § 307(c)(1) of the CZMA. Where sections of the statutes, such as § 19 of OCSLA and § 307 of the CZMA seem to overlap, it is the role of the court to give each statutory section effect as long as they are capable of co-existence. *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 155, 96 S.Ct. 1989, 1993, 48 L.Ed.2d 540 (1976), quoting *Morton* v. *Mancari*, 417 U.S. 535, 551, 94 S.Ct. 2474, 2483, 41 L.Ed.2d 290 (1974). Here, both § 19 of OCSLA and § 307 of the CZMA can be given effect without frustrating the purpose of either statute.

An examination of the language of the "savings clause" in OCSLA resolves the misconception that § 19 of OCSLA was intended to repeal the consistency requirements under § 307 of the CZMA. Section 608 of the 1978 Amendments to OCSLA expressly provides: "[N]othing in this Act shall be construed to modify, or repeal any provision in the Coastal Zone Management Act of 1972". 43 U.S.C. § 1866. In its discussion of § 19 of OCSLA, the House Committee attempted to clarify the potentially overlapping roles of the federal agency and the state in light of the CZMA's consistency requirements. Referring to the savings clause, 43 U.S.C. § 1866, the House Report explains: "Specifically, nothing is intended to alter procedures under [the Coastal Zone Management] Act for consistency

once a state has an approved Coastal Zone Management Plan". H.R.Rep.95-590, 95th Cong., 2d Sess. 153, n.52, *reprinted in* [1978] U.S.Code Cong. & Ad.News 1559.

An analysis of the rights and duties imposed by the two statutes reveals the mode of "co-existence" of the CZMA and OCSLA. Although both provisions focus on the leasing process, neither the obligations imposed nor the parties involved in the two provisions are identical. Section 19 of OCSLA requires that the Secretary consider recommendations submitted by the governor of the state where the lease sale is to be held. 43 U.S.C. § 1345. Once the Secretary has made certain determinations with regard to the recommendation, his decision to accept or reject the recommendations is final. In contrast, § 307(c) of the CZMA does not require that the Secretary evaluate such recommendations. The frame of reference for the Secretary's determination under the CZMA is the state's coastal management plan. The CZMA does not deprive the Secretary of the opportunity to regulate size, timing or location of proposed lease sales. No absolute veto power has been bestowed upon plaintiffs by § 307(c)(1). Instead, the CZMA provides a more complete opportunity for federal-state consultation and cooperation. In the event serious disagreements arise between the state and the federal government as to the propriety of the federal agency's determination, either party may seek mediation. 16 U.S.C. § 1456(h); 15 C.F.R. § 930.113-116.

In claiming that § 19 of OCSLA denies the states the right to participate in consultation or coordination of pre-leasing activities, defendants rely on *California* v. *Kleppe*, 604 F.2d 1187 (9th Cir. 1979). In *California* v. *Kleppe*, the Ninth Circuit focused on the question whether Congress intended the Secretary of the Interior or the Environmental Protection Agency to promulgate air quality regulations for the Outer Continental Shelf. The Secretary claimed authority to promulgate the regulations pursuant to OCSLA, while the EPA claimed authority to do so under the Clean Air Act, 42 U.S.C. §§ 7401 *et seq*. Looking to the legislative history and the language of the

1978 Amendments to OCSLA, the court found no indication that Congress had contemplated "dual jurisdiction" of the Secretary and of EPA over OCS activities which affect air quality. *California* v. *Kleppe*, *supra* at 1194. According to the court's analysis, there is no suggestion that the Secretary is to share authority to promulgate air quality regulations for the OCS. *Id.* at 1193.

The present case is readily distinguishable from *California* v. *Kleppe*. In contrast, here Congress did contemplate concurrent authority of the state and the federal agencies over the coordination of OCS activities. Although the savings clause, § 608 of OCSLA, 43 U.S.C. § 1866, does not explicitly protect whatever authority EPA might have had pursuant to its jurisdictional grant under the Clean Air Act, 42 U.S.C. § 7607(b)(1), it does explicitly provide that the requirements under the CZMA are neither modified nor repealed by the 1978 Amendments to OCSLA. The duties imposed on the Secretary under OCSLA are compatible with the duties imposed under the CZMA. Enforcement of the requirements of § 307 of the CZMA will not frustrate the Secretary's authority under OCSLA to make the resources of the OCS "available for expeditious and orderly development, subject to environmental safeguards". *See* 43 U.S.C. § 1332(3). Participation in the consultation process envisioned by the CZMA will, in fact, further the purposes of the CZMA.

Even though the obligations imposed on the Secretary under the CZMA do not impair his authority under OCSLA, it is conceded that the Secretary may be confronted by the complex task of resolving competing interests and balancing the numerous priorities set by Congress. Also, some delays are inherent in a planning process involving participants at all levels of government. But, it is not the proper function of the judiciary to question the means Congress has chosen to manage the resources of the coastal zone. This is a matter committed to legislative judgment. *Cf. Hodel* v. *Virginia Mining and Reclamation Assoc.*, ___ U.S. ___, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981).

E. NOAA's Interpretation

The administrative agency's interpretation of a statutory provision also aids the Court in its determination of the legislative intent of the CZMA. It is a settled principle that an agency's interpretation of a statute is normally entitled to deference from the courts. *Train* v. *NRDC*, 421 U.S. 60, 87, 95 S.Ct. 1470, 1485, 43 L.Ed.2d 731 (1975); *Udall* v. *Tallman*, 380 U.S. 1, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965); *see also American Petroleum Institute* v. *Knecht*, 456 F.Supp. 889 (C.D.Cal.1978). Here, the National Oceanic and Atmospheric Administration ("NOAA") is the agency within the Department of Commerce charged with the responsibility of promulgating regulations for the CZMA. *See American Petroleum Institute* v. *Knecht, supra*, at 908. During enactment of the 1976 amendments, Congress specifically directed NOAA to clarify certain requirements of the Act and thus affirmed the responsibility NOAA had assumed in administering the 1972 Act. The fact of NOAA's technical expertise in matters relating to the nation's coasts also suggests that deference should be accorded to its continuing construction of this Act. *See Ethyl Corp.* v. *Environmental Protection Agency*, 176 U.S.App.D.C. 373, 541 F.2d 1 (1976).

Until May 1981, NOAA consistently took the position that Interior's pre-leasing activities were subject to consistency review. For instance, in 1977, NOAA responded to a request to clarify the statutory language in the consistency provisions of § 307. NOAA then stated that it was "considering a position which treats the Department of the Interior's pre-lease sale decisions, such as tract selections and choice of lease stipulations, as a 'Federal activity' subject to the requirements of § 307(c)(1) of the Act". 42 Fed.Reg. 43586, 43591 (1977) (comment accompanying second set of proposed regulations). In light of the dispute between Interior and Commerce as to the applicability of the § 307(c)(1) consistency requirements to the OCS leasing process, NOAA refrained from taking a firm position at that time. *See* 42 Fed.Reg. 43592; 43 Fed.Reg. 10510, 10512 (1978).

NOAA's final regulations in 1978 were based upon a liberal construction of all threshold tests triggering consistency review under § 307. NOAA concluded that § 307(c)(1) (as well as the following subsections) was intended to apply to "all Federal actions which were *capable* of significantly affecting the coastal zone".[13] 43 Fed.Reg. 10510, 10511 (1978) (emphasis added). Favoring broad inclusion of federal activities in the process of consistency review, NOAA concluded that a federal action would meet the threshold test under § 307 even when cumulative effects are determined to be beneficial.[14] 43 Fed.Reg. 10510, 10519 (1978) (to be codified at 15 C.F.R. §§ 930.10-.145).

The NOAA regulations, as amended in June 1979, reflect the view that pre-leasing activities fall within the purview of § 307(c)(1). 44 Fed.Reg. 37142-43, 37146-47 (1979) (comment to 15 C.F.R. § 930.33 (1979)). In support of its view, NOAA explained that "[i]mplementation of this requirement at the OCS pre-lease sale stage should lead to minimization of adverse coastal environmental and socioeconomic impacts". 44 Fed.Reg. 37142. According to NOAA's comment, "Federal agencies are encouraged to construe liberally the 'directly affecting' test in borderline cases to favor inclusion of Federal activities subject to consistency review". *Id.* at 37146-47.

As recently as April 1980, NOAA reiterated this view. In a letter dated April 9, 1980, addressed to State Coastal Manage-

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[13] As discussed *infra* at p. 1380, the Court, in accord with the opinion letter issued by the Department of Justice, rejects the specific definition promulgated by NOAA in the 1978 regulations, in which a "significantly affecting" test is substituted for the "directly affecting" threshold test of § 307(c)(1). The rejection of NOAA's definition is not intended to imply a rejection of the general position of the agency to whom the Department of Commerce has delegated its functions pursuant to the CZMA. Deference to NOAA's support of a liberal construction of the threshold test does not require the adoption of NOAA's exact language in defining a statutory phrase.

[14] *See* Schoenbaum & Parker, *supra* note 4, at 231.

ment Program Directors, the Assistant Administrator of NOAA stated its view that "Federal consistency requirements subject final notices of OCS sales to consistency determinations". Ex. L-16.

In sum, NOAA's regulations and the comments thereto consistently supported the application of § 307(c)(1) to final notices of OCS sales. The view of the agency charged with implementing the CZMA, established over a long period of time, is certainly entitled to deference.

Recently, however, NOAA's position has changed abruptly. On May 14, 1981, approximately two weeks after the complaints were filed in the present cases, NOAA published a notice of proposed rulemaking in which it defined "directly affecting". 46 Fed.Reg. 26658, 26659 (1981). The definitions adopted by NOAA represent a complete departure from previous interpretations of the threshold phrase. According to NOAA's newly proposed definition, a federal activity directly affects the coastal zone only "if the Federal agency finds that the conduct of the activity itself produces a measurable physical alteration in the coastal zone or that the activity initiates a chain of events reasonably certain to result in such alteration, without further required agency approval". *Id.* In the comments to this notice, NOAA listed lease issuance as an example of an activity which would not be subject to a consistency determination because it does not directly affect the coastal zone. *Id.* at 26660. On July 2, 1981, NOAA issued its notice of final rulemaking which reiterated the view of the consistency requirements under the CZMA, as first announced less than two months earlier.

The new notice of rulemaking is not entitled to special deference here. The Secretary's negative determination was made more than a year before these regulations were issued. Federal defendants admit that these regulations have "no direct bearing on the validity of the Secretary's interpretation". Federal Defendants' Summary Judgment Memorandum at 32, n. 4. There is the ever-present danger that regulations pro-

posed subsequent to the initiation of the litigation are self-serving; thus, they are generally suspect. As newly proposed regulations at variance with the previous regulations, they do not reflect a well-established agency interpretation. Therefore, a principal rationale supporting deference to the agency is absent. *See Ethyl Corp.* v. *EPA*, *supra; cf. FTC* v. *Dean Foods Co.*, 384 U.S. 597, 86 S.Ct. 1738, 16 L.Ed.2d 802 (1966). Also, the Court finds that this newest interpretation is inconsistent with the CZMA's policy of furthering long-range planning for coastal resources. The Court is "not obliged to stand aside and rubber-stamp an administrative position deemed inconsistent with a statutory mandate". *NLRB* v. *Brown*, 380 U.S. 278, 291, 85 S.Ct. 980, 988, 13 L.Ed.2d 839 (1965). Here the position is inconsistent not only with statutory policy, but with the agency's own interpretation during the past four years. Therefore, the Court concludes that although NOAA's longstanding interpretation of the consistency requirements is entitled to deference, NOAA's new interpretation, first proposed in May 1981, is not.

F. Applicability Of Dictionary Definitions

Defendants contend that the phrase directly affects should be construed by reference to the definition of "directly" found in Webster's dictionary. Webster's New International Dictionary (unabridged 3d ed. 1971) provides six alternative definitions for the word "directly":

1. a. without any intervening space or time; next in order; squarely, exactly;

   b. in a straight line; without deviation of course, by the shortest way.

2. a. straight on; along a definite course of action without deflection or slackening;

   b. purposefully or decidedly and straight to the mark; in a straightforward manner without hesitation, circumlocution, or equivocation; plainly and not by implication; in unmistakable terms; unqualifiedly;

   c. without divergence from the source or the original;

d. simultaneously and exactly or equally.

3. in close relational proximity.

4. a. without any intervening agency or instrumentality of determining influence; without any intermediate step;

b. in the exact words of the original; verbatim.

5. a. in independent action without any sharing of authority or responsibility;

b. face-to-face, in person.

6. a. without a moment's delay; at once, immediately;

b. after a little, in a little while, shortly, presently.

According to defendants, the "plain meaning", based upon the dictionary definition, is "effects resulting from an activity without an intervening cause". Federal Defendants' Reply Memorandum in Support of Their Motion for Summary Judgment at 14. Defendants' invocation of the plain meaning rule to support their choice among rival definitions of an inherently vague phrase should not be allowed to cloud the issue. As one commentator has warned, reliance on the plain meaning rule is too often merely "verbal table thumping to reinforce confidence in an interpretation arrived at on other grounds". Sands, 2A Sutherland Statutory Construction, § 46.01 at 49 (3d ed. 1973).[15] Use of the plain meaning label is simply a subterfuge in the present case. Although Webster offers six alternative definitions, defendants ignore four of the six meanings without explanation. Moreover, their choice of phrasing—"effects resulting from an intervening cause"—is not identical to any definition presented by Webster; it merely incorporates a portion of two of the six alternatives.

The defendants' construction of the phrase would produce an unreasonable result. The doctrines of intervening cause and

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[15] *See also* Merz, The Meaninglessness of the Plain Meaning Rule, 4 Dayton L.Rev. 31 (1979).

proximate cause are familiar guiding principles in the law of torts, but there is no basis for importing those concepts into the present context. The doctrine of intervening cause was created by the courts to limit the extent of the defendant's liability for damages in tort. W. Prosser, Law of Torts § 44 (4th ed. 1971). It has no relevance in construing the CZMA which has the purpose of providing long-term planning for the presentation and management of coastal resources. Where the "plain meaning" would produce a result at odds with the policy of the statute in question, the Court should look to the purpose of the legislation rather than to a definition borrowed from another context. *Trustees of Indiana University* v. *United States*, 618 F.2d 736 (Ct.Cl.1980). The dictionary definitions advanced by the defendants are clearly contrary to the congressional intent and, if applied, would thwart the objectives of the CZMA. In fact, as they must admit, if the definitions urged by the Secretary and the intervenor defendants were adopted, the issuance of the final notice of lease sale would require a consistency determination only in the rarest case. Such a result would not be in furtherance of the stated policies and goals of the CZMA.

Finally, although not necessary to this decision, it should be noted that if defendants' definition were applied in construing the threshold under § 307(c)(1), the Court need not reach a contrary result. There are cases supporting the view that a lessor may be held liable for activities carried on by the lessee where land was leased for the purpose of carrying on the very activity which caused the harm. *See, e.g., Green* v. *Asher Coal Mining Co.*, 377 S.W.2d 68 (Ky.1964); *United States* v. *Morrell*, 331 F.2d 498 (10th Cir. 1964); *Daigle* v. *Continental Oil Co.*, 277 F.Supp. 875 (W.D.La.1967); *Benton* v. *Kernan*, 130 N.J.Eq. 193, 21 A.2d 755 (1941). In *Green* v. *Asher Coal Mining Co., supra*, the court held that the owner of land leased for strip mining purposes could be held liable for injury arising out of the acts of the lessee. The court reasoned that an owner cannot escape liability by showing that he did not personally create the condition or commit the wrongful act, if the expected operations under the lease result in an injury that might

have been reasonably anticipated. *Id.* at 72. Similarly, in *Daigle* v. *Continental Oil Co.*, *supra*, a lessor of land on which the carbon black plant of lessee was located was held liable to adjacent property owners for damage caused by emission of carbon black and coke dust from the plant.

In these cases, the parties did not frame their arguments in terms of intervening cause. The results, however, comport with a finding of no intervening cause.[16] The cases stand for the proposition that the lessor is not automatically relieved of liability for activities conducted by his lessee; that is, the lessee's involvement in the tortious conduct does not necessarily constitute intervening cause. Therefore, pre-leasing activities could have direct effects even if "direct" is defined on the basis of tort concepts. Defendants cannot deny that leasing activities have consequences in the coastal zone by pointing to a series of events which occur after the leases are issued, but before the actual effects are realized. The lessor of vast tracts in the OCS where sizeable oil reserves have been estimated to exist "reasonably anticipates" effects in the coastal zone as a result of oil exploration, development, and production to be conducted by the lessees. The reasonable anticipation of these effects is obvious.

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[16] As defined in Black's Law Dictionary (5th ed. 1979),

> The "intervening cause," which will relieve of liabilty for an injury, is an independent cause which intervenes between the original wrongful act or omission and the injury, turns aside the natural sequence of events, and produces a result which would not otherwise have followed and *which could not have been reasonably anticipated*. (Emphasis added).

Thus, when the court in *Green* v. *Asher Coal Mining Co.*, 377 S.W.2d 68 (Ky.1964), employed the phrase "reasonably anticipated" in describing the causal connection between the leasing and the injury for which the lessor could be held liable, the court in effect concluded that none of the events subsequent to the leasing constituted intervening cause. *Id.* at 72.

G. The Opinion Letter Of The Department Of Justice

In construing the ambiguous language within § 307(c)(1), the Court must also give serious consideration to the opinion letter written by the Department of Justice on April 20, 1979. Ex. L-A. *Cf. Train* v. *NRDC*, 421 U.S. 60, 95 S.Ct. 1470, 43 L.Ed.2d 731 (1974). The Department of Interior, charged with administering leasing activities in the OCS, and the Department of Commerce, responsible for the approval of state coastal management programs under the CZMA, disagreed as to the applicability of the consistency requirements of § 307(c)(1) to the OCS pre-leasing activities of the Secretary of the Interior. In its opinion letter, the Department of Justice expressly repudiated Interior's contention that its pre-lease activities were *per se* exempt from the consistency requirement of § 307(c)(1). After analyzing the legislative history, the interrelationship of two of the consistency provisions, and the significance of subsequent legislation concerning the OCS, the Department of Justice concluded that "pre-leasing activities of the Secretary of Interior are subject to the conformity requirement of § 307(c)(1)". Ex. L-A at 13. Thus, the opinion lends further support to the Court's interpretation of the scope of the requirement in light of the legislative history and purpose of the statute.

The opinion letter does not attempt to resolve the problem of the proper definition of the phrase "directly affects". However, it does reject the substitution of the term "significantly" for the statutory term "directly". In the view of the Department of Justice, the legislative history does not justify this substitution. The Court concurs in this view.

The opinion did not reach the question whether the particular lease sale out of which the dispute arose[17] did directly affect

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[17] The dispute arose out of Lease Sale No. 48 involving 148 OCS tracts off southern California. The lease sale was held on June 29, 1979. Ex. L-27 (Summary of Mediation Conference between Califor-

the coastal zone. According to the Department of Justice, the question whether particular pre-leasing activities affect the coastal zone is one of fact and thus the Department was not authorized to answer the question. Ex. L-A.

H. The Direct Effects Of Lease Sale No. 53

Although the Court is convinced that a final notice of lease sale would invariably directly affect the coastal zone in all but the most unusual case—a case which probably could only be posed as a hypothetical—it declines to hold that the final notice of lease sale is a generic category of federal activity which directly affects the coastal zone within the meaning of 307(c)(1). The Court agrees with the Justice Department that the determination as to whether the final notice of lease sale directly affects the coastal zone must be made on a case-by-case basis.

On these facts, the Court has no difficulty in finding such a direct effect. There is ample evidence within the administrative record that the Notice of Lease Sale No. 53 directly affects the coastal zone and, thus, satisfies the threshold test under § 307 of the CZMA.

For example, a reading of the notice itself reveals some of the many consequences of leasing upon the coastal zone. The "Notice of Oil and Gas Lease Sale No. 53 (Partial Offering)", as published in the Federal Register,[18] announced ten stipulations to be applied to federal lessees. The activities permitted and/or required by the stipulations result in direct effects upon the coastal zone. Stipulation No. 4 sets forth the conditions for operation of boats and aircraft by lessees. Stipulation No. 6 states the conditions under which pipelines will be required;

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nia and the Department of Interior, Oct. 19, 1979); Ex. L-7 (Mediator's Memorandum for the Secretary of Commerce, Jan. 25, 1980); *see also* Linsley, *supra* note 2 at 454-461.

[18] 46 Fed.Reg. 23674 (1981), Ex. L-4.

the Department of Interior, as lessor, specifically reserves the right to regulate the placement of "any pipeline used for transporting production to shore". Lessees must agree, pursuant to Stipulation No. 1, to preserve and protect biological resources discovered during the conduct of operations on the leased area.

The Secretarial Issue Document ("SID"), prepared in October 1980 by the Department of Interior to aid the Secretary in his decision, contains voluminous information indicative of the direct effects of this project on the coastal zone. For instance, the SID contains a table showing the overall probability of an oilspill impacting a point within the sea otter range during the life of the project in the northern portion of the Santa Maria Basin to be 52%.[19] Both the SID and the EIS contain statistics showing the likelihood of oilspills during the life of the leases; based on the unrevised USGS estimates, 1.65 spills are expected during the project conducted in the Santa Maria subarea. *See* SID at 190; *see also* EIS at 4-1 to 4-16. According to the SID, the probability of an oilspill is even higher when the revised USGS figures are utilized.

In addition, both the SID and the EIS list a multitude of impacts arising out of the operations in the leasing area of Lease Sale No. 3. The EIS, prepared by the BLM at the request of the Department of the Interior, includes a section entitled "Unavoidable Adverse Impacts"; the SID discusses the same factors under the caption "Multiple-Use Conflicts". Disregarding the titles, the information contained in these sections is indicative of the consequences flowing from the

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[19] *See* Table 3 in FWS letter of September 18, 1980, appended to SID, Ex. L-C at 205. This figure represents the overall probability that one or more oilspills of 1,000 barrels or more will occur during the lifetime of the project and impact designated targets within 30 days. The FWS considers the data concerning the impact upon the sea otter range within 30 days to be the "primary data that should be considered when assessing possible effects on sea otters". Ex. L-C at 189.

Notice of Lease Sale 53 to the coastal zone. Both documents refer to impacts upon air and water quality, marine and coastal ecosystems, commercial fisheries, recreation and sportfishing, navigation, cultural resources, and socio-economic factors. EIS at 4-183 to 4-186; SID 80-132. For instance, the EIS states that "[n]ormal offshore operations would have unavoidable effects . . . on the quality of the surrounding water". Pipelaying, drilling, and construction, chronic spills from platforms, and the discharge of treated sewage contribute to the degradation of water quality in the area. EIS at 4-183. As to commercial fisheries, drilling muds and cuttings "could significantly affect fish and invertebrate populations"; the spot prawn fishery in the Santa Maria Basin is particularly vulnerable to this physical disruption. EIS at 4-184. In reference to recreation and sportfishing, the EIS indicates the possibility of adverse impacts as a result of the competition for land between recreation and OCS-related onshore facilities as a result of the temporary disruption of recreation areas caused by pipeline burial. EIS at 4-184 to 4-185. There are the additional risks of "the degradation of the aesthetic environment conducive to recreation and the damage to recreational sites as a result of an oil spill". EIS at 4-185. Another impact on the coastal zone will occur as a result of the migration of labor into the area during the early years of oil and gas operations. EIS at 4-185. Another impact on the coastal zone will occur as a result of the migration of labor into the area during the early years of oil and gas operations. EIS at 4-185. Impacts on the level of employment and the size of the population in the coastal region are also predicted. EIS at 4-54.

The SID notes that there are artifacts of historic interest as well as aboriginal archaeological sites reported in the area of the Santa Maria tracts. SID at 119. The FWS and NMFS biological opinions, appended to the SID, indicate the likelihood that development and production activities may jeopardize the existence of the southern sea otter and the gray whale. SID at 146.

These effects constitute only a partial list. Further enumeration is unnecessary. The threshold test under § 307(c)(1) would

in fact be satisfied by a finding of a single direct effect upon the coastal zone. Although the evidence of direct effects is substantial, such a showing is not required by the CZMA. It is manifest that a consistency review is required in this case.

III. NEPA

Plaintiffs also seek to enjoin the leasing of tracts in the northern portion of the Santa Maria Basin on the basis of the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4331 *et seq.* They allege that defendants have failed to comply with § 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C), which requires federal agencies to prepare and to circulate an environmental impact statement ("EIS") for major federal actions significantly affecting the quality of the human environment. Plaintiffs challenge the adequacy of the EIS prepared for Lease Sale No. 53 because the EIS failed to incorporate the most recent estimates of oil and gas reserves in the basin. Due to the alleged failure of the EIS to consider the newest data concerning the estimated hydrocarbon reserves, plaintiffs contend that a supplemental EIS is required by NEPA.

In September 1980, the final EIS on Lease Sale No. 53 was released by the Bureau of Land Management ("BLM"). The evaluation of environmental effects of Lease Sale No. 53 was based upon existing estimates of recoverable oil and gas resources, provided by the United States Geological Survey ("USGS"), Conservation Division, Los Angeles, California. At page xii of the EIS is an Addendum which presents the revised estimates of oil and gas resources for the five basins involved in Lease Sale No. 53, as of August 28, 1980. The expected recoverable resources were found to be "roughly twice the amount assumed in the draft and final EIS analyses". EIS at xii. The evaluations in the body of the EIS are based upon the original USGS estimates of reserves, rather than one on the more recent statistics. A Secretary Issue Document ("SID"), prepared in October 1980 for then Secretary Andrus did, however, incorporate the revised USGS estimates.

The central issue to be resolved is whether the EIS filed by the BLM concerning proposed Lease Sale No. 53 was adequate according to procedures set forth in the National Environmental Protection Act. In evaluating the procedural adequacy of the EIS, the Court is guided by the standard applied by this circuit:

> [A]n EIS is in compliance with NEPA when its form, content, and preparation substantially (1) provide decision-makers with an environmental disclosure sufficiently detailed to aid in the substantive decision whether to proceed with the project in the light of its environmental consequences, and (2) make available to the public, information of the proposed project's environmental impact and encourage public participation in the development of that information. [Citation omitted]

Columbia Basin Land Protection Association v. *Schlesinger*, 643 F.2d 585, 592 (9th Cir. 1981). The adequacy of the content of the EIS is determined by a rule of reason, which requires only "[a] reasonably thorough discussion of the significant aspects of the probable environmental consequences". *Id.*, quoting *Trout Unlimited* v. *Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974). As the Ninth Circuit has cautioned, there is no *per se* rule requiring the inclusion of every potentially significant statistic. *See Westside Property Owners* v. *Schlesinger*, 597 F.2d 1214, 1217 (9th Cir. 1979). Rather, "the test of EIS adequacy is pragmatic and the document will be examined to see if there has been a good faith attempt to identify and to discuss all foreseeable environmental consequences". *Columbia Basin Land Protection Association* v. *Schlesinger*, *supra*, at 592, quoting *Warm Springs Dam Task Force* v. *Gribble*, 565 F.2d 549, 552 (9th Cir. 1977) (*per curiam*).

The sole procedural defect of which plaintiffs complain is the failure of defendants to incorporate the USGS revised estimates in the discussion of environmental effects in the EIS. At the outset, it must be noted that defendants did not completely ignore the new estimates. The revised USGS estimates were clearly presented in an addendum at p. xii which preceded the main body of the EIS. Thus, it cannot be said that this information was not made available to the public.

Also, the EIS did point out the "high degree of uncertainty regarding the level of oil and gas reserves which might be present". EIS 1-12. The unrevised USGS estimate which predicts an initial yield of 400 million barrels for the Santa Maria Basin, is described as a "conditional probability". EIS 1-9, 1-11. Thus, the EIS does not disguise the fact that estimates of oil reserves, which form the basis of the predictions of a variety of environmental impacts, are "inherently speculative". EIS 1-13. Thus, this preliminary explanation of the reliability of estimates of hydrocarbon reserves serves as evidence of a "good faith attempt" to discuss foreseeable environmental consequences.

Perhaps, as plaintiffs suggest, detailed analysis of this new data, incorporated in the body of the EIS, would be more effective in informing the public of the potential risk posed to the environment. However, the format selected for the presentation of the information is left to the discretion of the federal agency. The Court's role is to ensure that the agency has taken a "hard look" at the environmental consequences, *Kleppe* v. *Sierra Club*, 427 U.S. 390, 96 S.Ct. 2718, 49 L.Ed.2d 576 (1976), and not to prescribe in detail the method by which the agency conveys this information to the public.

Assuming for the purpose of argument that the EIS was inadequate, according to the procedures set forth in NEPA, defendants argue that the SID has cured this alleged inadequacy. The SID, prepared a month after the EIS, presented the revised USGS figures and analyzed certain environmental impacts on the basis of the current estimates. SID at 1, 59. While the SID comments that the revised USGS estimates, which "indicate significantly higher resources for oil and gas", result in "higher environmental cost estimates", *Id.* at 1, it is not clear that the SID's limited analysis of the revised figures sufficiently clarifies the issues raised by the prediction doubling the estimated hydrocarbon reserves. Nevertheless, the Court need not reach the question whether the SID alone would cure the alleged defect. Although the SID may not be sufficient in itself to remedy the omission of significant data,

the document is likely to be helpful as a complement to the EIS by interpreting or clarifying issues raised in the EIS. *North Slope Borough* v. *Andrus*, 642 F.2d 589 (D.C.Cir.1980).

Under the facts of this case, the Department of Interior's actions in filing the EIS with an addendum presenting the newly revised estimates of hydrocarbon reserves, in addition to preparing an SID which analyzes certain impacts in light of the new data, comport with NEPA. Due to the high degree of uncertainty regarding the estimates of hydrocarbon reserves in the Santa Maria Basin, the decision of the Department of Interior not to file a supplement or to revise the existing EIS in the few days remaining before publication is not unreasonable. The Court concludes that "although the EIS could be 'improved by hindsight,' it has satisfied the intent" of NEPA. *Cady* v. *Morton*, 527 F.2d 786, 797 (9th Cir. 1975), quoting *National Forest Preservation Group* v. *Butz*, 485 F.2d 408, 412 (9th Cir. 1973).

IV. SECTION 19 OF THE OUTER CONTINENTAL SHELF LANDS ACT

A third claim for injunctive and declaratory relief is premised on the Secretary's alleged violation of § 19 of the Outer Continental Shelf Lands Act ("OCSLA"). 43 U.S.C. § 1345. Section 19 provides that the governor of an affected state may submit recommendations to the Secretary regarding the size, time or location of a proposed lease sale, 43 U.S.C. § 1345(a), and that the Secretary is required to accept the governor's recommendations "if he determines . . . that they provide for a reasonable balance between the national interest and the well-being of the citizens of the affected State". 43 U.S.C. § 1345(c). Plaintiffs contend that the Secretary's decision to reject Governor Brown's recommendation to delete the tracts in dispute from Lease Sale No. 53 fails to comply with § 19. According to plaintiffs, since the Governor's recommendation provided for a "reasonable balance" as required by § 19, the Secretary was obligated to accept the recommendation.

In deciding whether the Secretary's decision to proceed with Lease Sale No. 53 complies with § 19 of OCSLA, the scope of the court's inquiry is limited by the deferential standard of review applicable to this determination. *See, e.g., Ethyl Corp.* v. *EPA*, 176 U.S.App.D.C. 373, 541 F.2d 1 (D.C.Cir.1976). The statute itself provides that the Secretary's acceptance or rejection of such recommendations shall be final, "unless found to be arbitrary or capricious". 43 U.S.C. § 1345(d). In determining whether the Secretary's rejection of the Governor's recommendations was arbitrary or capricious, the Court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 823, 28 L.Ed.2d 136 (1971), quoted in *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285, 95 S.Ct. 438, 441, 42 L.Ed.2d 447 (1974); *Washington State Farm Bureau* v. *Marshall*, 625 F.2d 296 (9th Cir. 1980). The Court may not substitute its judgment for that of the agency.

In the present case, the record shows that the Secretary did undertake an examination of the balance between the interests at stake in Lease Sale No. 53. In a letter subsequently mailed to the Governor, the Secretary described the mode of analysis employed in the Secretary's balancing process. Defendants' Ex. L-P (letter from Secretary Watt to Governor Brown, dated May 1, 1981). This explanation indicates that the Secretary evaluated such "quantifiable factors" as income from resource development and expected monetary losses due to oil spills. Factors which, in the Secretary's view, were "not quantifiable", including damage to wildlife, decline in water quality, and "aesthetic and lifestyle losses", were given only cursory consideration. A thorough evaluation of all relevant factors through more sophisticated analytical techniques would certainly have been desirable, but within wide limits, the final decision as to the type of analysis which is appropriate in view of the available data must be the agency, subject to review only for obvious errors of methodology. *Massachusetts* v. *Andrus*,

594 F.2d 872, 886 (1st Cir. 1979). Under the applicable standard of review, the Court cannot conclude that there has been a clear error of judgment.

The Secretary's mode of analysis must also be considered in light of the fact that OCSLA provides little or no guidance as to the proper basis for the Secretary's evaluation of a governor's recommendation. In deciding whether to accept or reject the Governor's recommendation, the Secretary must determine whether it provides for a "reasonable balance" of two key factors—the "national interest" and the "well-being of the citizens of the affected State". 43 U.S.C. § 1345(c). Section 19 requires that the determination of the "national interest" be based on "the desirability of obtaining oil and gas supplies in a balanced manner", but provides no basis for evaluating the citizens' well-being. *Id.*

Nevertheless, the fact that the statute fails to provide explicit guidance will not excuse the absence of reasoned analysis of all considerations specified within the Act. The Court has a responsibility to scrutinize an agency's judgment as to the proper balance to be struck between conflicting interests. *NLRB* v. *Brown*, 380 U.S. 278, 85 S.Ct. 980, 13 L.Ed.2d 839 (1965). Here, the Secretary's extremely limited consideration of one of two potentially conflicting interests, the "well-being of the citizens of the affected State", barely suffices to meet the plaintiffs' challenge.

Plaintiffs also point to purported procedural flaws in the Secretary's determination pursuant to § 19. First, plaintiffs complain of a lack of opportunity for consultation. The statute imposes the responsibility on the Secretary for the provision of such an opportunity. 43 U.S.C. § 1345(c). However, the timing of the opportunity and the mode of making consultation available is within the Secretary's discretion. The record indicates the existence of limited formal correspondence between the parties, including Governor Brown's letter of December 24, 1980, and Secretary Watt's letter of February 10, 1981. Although minimal communication in writing is not conductive to

meaningful consultation between the Secretary and the Governor, it nevertheless meets the bare technical requirements of the statute. In sum, there is an insufficient basis for the conclusion that the Secretary arbitrarily and capriciously deprived the Governor of further opportunities for consultation.

A second alleged procedural flaw relates to the requirement that the Secretary communicate to the Governor in writing his reasons for rejecting the recommendation. 43 U.S.C. § 1345(c). The Secretary's letter to Governor Brown, dated May 1, satisfies this requirement. The statute does not require that the written explanation be provided prior to the Secretary's announcement of his decision to proceed with the lease sale. Although the provision of a timely explanation is likely to be more effective in implementing the statutory policy of insuring governors of affected states a "leading role in OCS decisions",[20] H.Conf.Rep. 95-1474, 95th Cong., 2d Sess. 106, *reprinted in* [1978] U.S.Code Cong. & Ad.News 1674; H.R.Rep. 95-590, 95th Cong., 2d Sess. 152, *reprinted in* [1978] U.S.Code Cong. & Ad.News 1558, the Court cannot substitute its judgment for that of Congress by imposing a requirement concerning the timing of the explanation.

There is one further aspect of the timing of the explanation which requires comment. Because the Secretary's reasons for his decision were committed to writing 21 days after the announcement of the decision and 2 days after this suit was filed alleging a failure to provide an adequate rationale for the rejection of the Governor's recommendation, the Secretary's explanation is subject to the inherent danger of "*post hoc*

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[20] Section 19 is "intended to insure that Governors of affected States, and local government executives within such States, have a leading role in OCS decisions and particularly as to lease sales and development and production plans. In addition, it is intended to provide a mechanism for involvement of Governors and local government officials". H.Rep. 95-590, 95th Cong., 2d Sess. 152, *reprinted in* [1978] U.S.Code Cong. & Ad.News 1558.

rationalization". *See Overton Park* v. *Volpe*, *supra*, 401 U.S. at 419-20, 91 S.Ct. at 825; *American Petroleum Institute* v. *Knecht*, *supra*, at 908-9. An explanation which takes on the aspect of a litigation affidavit must, of course, be viewed critically. *Id.* However, the danger presented by *post hoc* explanations may be less where, as here, the announced agency decision was accompanied by a contemporaneous explanation of some of the considerations that formed a basis of the decision,[21] and where the administrative record lends some support to the explanation. *See Camp* v. *Pitts*, 411 U.S. 138, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973) (*per curiam*). That is the best that can be said for the Secretary's timing.

Taking into consideration all of the foregoing factors, the Court must conclude that the Secretary has complied, although minimally, with the necessary procedural requirements under § 19 of OCSLA. 43 U.S.C. § 1345. Although the Secretary quite clearly violated the spirit of the Act, giving due deference to his judgment, it cannot be said that his determination to reject the recommendation submitted by Governor Brown was legally "arbitrary and capricious".

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[21] On April 10, 1981 at 10:00 a.m., the Department of Interior issued a news release, discussing generally the accelerated five-year offshore leasing plan proposed by the Department of Interior. Included in the New Release is a brief discussion of Lease Sale No. 53, in which some of the interests "balanced" by the Secretary are noted.

Defendants have questioned the propriety of considering information contained in documents which do not form a part of the administrative record. The Ninth Circuit has concluded that where the court finds it necessary to go outside the administrative record, it may consider such evidence "to ascertain whether the agency considered all the relevant factors or fully explicated its course of conduct or grounds of decision". *Asarco, Inc.* v. *EPA*, 616 F.2d 1153 (9th Cir. 1980). Under this analysis, it is proper to consider the press release in evaluating the danger of *post hoc* rationalization in the Secretary's course of action, described *supra*.

V. ENDANGERED SPECIES ACT

As a fourth ground of relief, plaintiffs allege that defendants have violated the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 *et seq.*, which directs federal agencies "to conserve endangered and threatened species". 16 U.S.C. § 1531(c). Section 7(a) of the Act requires each federal agency to "insure" that an action by that agency "does not jeopardize the existence of any endangered species or threatened species . . ." 16 U.S.C. § 1536(a)(2). In order to facilitate compliance with this requirement, the Act imposes on the Secretary and any agency whose actions may affect an endangered or threatened species the duty of "consultation".[22] Section 7(c)(1), 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.04 (1980). Section 7(c)(1) provides:

> To facilitate compliance with the requirements of subsection (a)(2) of this section, each Federal agency shall . . . request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action.

In fulfilling the consultation requirement of Section 7(c), the agency is required to "use the best scientific . . . data available". *Id.*

During April of 1980, the BLM requested biological opinions from the two federal agencies with jurisdiction over the marine animals which it had determined were likely to be affected by the proposed lease sale. In response to this request, the Na-

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[22] The implementing regulations under § 7 of ESA provide for formal consultation with one or both of two agencies which share responsibilities under the ESA; these agencies are the United States Fish & Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS"). 50 C.F.R. §§ 402.01, 402.04.

tional Marine and Fisheries Service ("NMFS") prepared a biological opinion on the impact of the lease sale on various species of whales and sea turtles, and the Fish and Wildlife Service ("FWS") prepared a biological opinion on the impact of the lease sale on the southern sea otter and other species of wildlife. Ex. L-5 (FWS Opinion), Ex. L-6 (NMFS Opinion). Both opinions concluded that the proposed lease sale and exploration activities associated with Lease Sale No. 53 were not likely to jeopardize any endangered or threatened species. *Id.*

Plaintiffs challenge the adequacy of the two biological opinions. First, plaintiffs claim that, in failing to reappraise the risks posed by leasing activities and exploratory drilling in light of the revised USGS resource estimates, defendants have not employed "the best scientific data available". Secondly, according to plaintiffs, biological opinions which fail to evaluate the risks at the development and production stages cannot provide an adequate basis for a finding of no jeopardy.

The short answer to plaintiffs' expressed concern that defendants did not utilize the newest information as to the revised oil reserve estimates is simply that the agencies which prepared the biological opinions did evaluate the risks posed to endangered or threatened species in light of that data. The FWS opinion discussed the significance of the revised USGS resource estimates in its analysis of the cumulative effects upon sea otters as the result of an oil spill, and explicitly stated that its findings were based on "the new oilspill analysis data of August 28, 1980". Ex. L-5 at 9-11. The NMFS opinion was drafted before the NMFS became aware of the revised estimates of hydrocarbon potential. However, upon consideration of the revised estimates, the NMFS concluded that there was "no increased risk to marine mammals and endangered species" during the leasing and exploration stages and, therefore, no modification of the biological opinion prepared for Lease Sale No. 53 was required. Declaration of James H. Lecky.[23]

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[23] James H. Lecky, as Marine Mammal and Endangered Species Coordinator for the Southwest Region, NMFS, was responsible for

Any question as to the extent of the consideration given the revised resource estimates is beyond the proper scope of review. *See, e.g., Citizens to Preserve Overton Park* v. *Volpe, supra*, 401 U.S. at 416, 91 S.Ct. at 823. Since there is evidence of consideration of the new USGS data, the Court must conclude that the consultation was based upon the "best scientific information available" as required by § 7 of ESA.

The potential risks that may be incurred during the development and production phases were not ignored during the consultation process. In fact, the FWS opinion acknowledges that potential development/production-related facilities could have an effect on endangered and threatened species. Ex. L-5 at 3. Since the specific location, nature, and size of facilities that might be necessary during these phases is not yet known, the potential jeopardy to the endangered species posed by these subsequent phases of OCS development was not determined. *Id.;* Ex. L-6 at 4. Both opinions indicated, however, the necessity of reinitiation of consultation pursuant to § 7 of ESA prior to approval of development/production plans. *Id.* In light of the restrictions imposed on the FWS and the NMFS by the limited quantity of available information, the decision to evaluate only the risks incurred during leasing and exploration and to reinitiate consultation prior to development and production cannot be held unreasonable. *See North Slope* v. *Andrus, supra*, at 606-609, and *Conservation Law Foundation* v. *Andrus*, 623 F.2d 712, 715 nn.2-3, 14 [BNA] E.R.C. 1049, 1050-51 and nn. 2-3 (1st Cir. 1979); *but see Hill* v. *TVA*, 549 F.2d 1064, 1070-72 (6th Cir. 1977), *aff'd*, 437 U.S. 153, 98 S.Ct. 478, 54 L.Ed.2d 312 (1978).

Plaintiffs allege a violation of another section of the ESA, § 7(d), which provides that a federal agency "shall make no irretrievable commitment of resources . . . which has the ef-

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the preparation of the biological opinion which NMFS submitted to BLM on September 17, 1980.

fect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures" which would avoid jeopardizing the existence of any endangered or threatened species. 16 U.S.C. § 1536(d). Plaintiffs have not demonstrated that such an irreversible or irretrievable commitment of resources has occurred as a result of the activities thus far approved during § 7 consultation. Although not yet addressed by the Ninth Circuit, two other circuits have rejected similar arguments to the effect that an OCS sale constitutes an "irreversible or irretrievable commitment of resources" within the meaning of § 7(d). *North Slope* v. *Andrus, supra; Conservation Law Foundation* v. *Andrus, supra.*

VI. "TAKING" UNDER § 9 OF THE ENDANGERED SPECIES ACT AND UNDER THE MARINE MAMMAL PROTECTION ACT

Plaintiffs' final claim arises under § 9 of ESA, 16 U.S.C. § 1538, and under the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. § 1361 *et seq.* They argue that a "taking" under § 9 of ESA and under the MMPA will result from the leasing of tracts in the northern Santa Maria Basin. The defendants' activities relating to Lease Sale No. 53 are not encompassed by the prohibitions of either § 9 of ESA or the MMPA.

The language of the statutes provides no support for plaintiffs' arguments. The statutes forbid any person to "take" any marine mammal or endangered species of fish or wildlife from waters within the jurisdiction of the United States. 16 U.S.C. § 1372(a)(1); 16 U.S.C. § 1538(a)(1). Assuming *arguendo* that the proposed leasing activities do constitute a threat to the continued survival of species protected by these statutes, such a threat would still not constitute a "taking" under the statutes. ESA defines the term "take" as meaning "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct". 16 U.S.C. § 1532(19). Thus, in prohibiting "taking", the draftsmen of the

statutes envisioned a more immediate injury. *Cf. Palila* v. *Hawaii Dept. of Land & Natural Resources*, 471 F.Supp. 985 (D.Hawaii 1979). A review of the record reveals no clear showing of such harm, attempted harm, or harassment[24] as is required by the statutes. Plaintiffs have not demonstrated that defendants' activities relating to Lease Sale No. 53 are encompassed by § 9 of ESA or by the MMPA.

VII. THE PROPER SCOPE OF ANALYSIS UNDER ESA, THE MMPA AND THE CZMA.

A question common to three of the statutes relied upon by plaintiffs—ESA, the MMPA and the CZMA—is whether the Court should focus on a discrete stage of a multistage OCS project designed to exploit and develop the mineral resources of the OCS or whether the Court should examine the project as a continuum of planned events. That is, in analyzing plaintiffs' claims under the different environmental statutes, should the Court look at Lease Sale No. 53 merely as the first discrete link in the chain or should the Court consider the lease sale by reference to the complete chain of events which it initiates? The answer to this question cannot be the same for all of the statutes involved here. To determine the proper scope of analysis, the Court must look to the policy behind the statute.

The CZMA, as discussed *supra*, is intended to further the development and implementation of comprehensive management programs for the coastal area. The needs of present and future generations are to be considered during the planning process envisioned by Congress. Under the CZMA, a myopic view of an isolated phase of a multistage project would be inappropriate. The decision-makers must integrate the full

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[24] The regulations of the Fish and Wildlife Service further define "harass" as "an intentional or negligent act or omission . . . annoying wildlife to such an extent as to significantly disrupt normal behavior patterns. . . ." 50 C.F.R. § 17.3. There is no evidence in the record to support such a finding of harassment.

panopoly of possibilities into a comprehensive plan. Thus, the states and the federal agencies must consider long-term effects as well as immediate effects in order to manage the coastal zone effectively. It would be unrealistic to declare that the goal of Lease Sale No. 53 is merely leasing tracts and not "pumping oil". *See North Slope Borough* v. *Andrus*, *supra*, at 608. The CZMA requires an evaluation of the consequences of the lease sale as well as the resulting activities occurring as a result of the notice of sale.

In contrast, ESA and the MMPA have a narrower focus. ESA, like the CZMA, is intended to serve the goal of preservation of fragile environmental resources. In the case of ESA, the protected resource is the species threatened with extinction, whereas, under the CZMA, all coastal resources are to be protected to accomplish the goal of preservation. ESA relies on different means from those of the CZMA. ESA does not focus on comprehensive planning. Instead, it prescribes safeguards, such as specific prohibitions on particular acts, such as killing or wounding an endangered species of fish or wildlife. *Sierra Club* v. *Froehlke*, 534 F.2d 1289 (8th Cir. 1976). Under ESA, the Secretary is required to make individual determinations as events arise concerning the risk posed to a threatened or endangered species by a particular action. It may not be feasible to prescribe the proper safeguards until the discrete stage is at hand. Thus, a more limited focus is appropriate under ESA. The same distinction applies to the MMPA as opposed to the CZMA. The MMPA prescribes specific safeguards in order to prevent imminent harm or harassment of marine mammals; it provides restrictions on the "taking" and importing of certain species of marine mammals, and provides for enforcement of the restrictions. 16 U.S.C. §§ 1371-1377. A focus on a discrete stage of activity is also appropriate to effectuate the purpose of the MMPA just as it is with respect to the ESA. In sum, in this case, an examination of the threat posed by specific activities at the time the immediate threat is posed will carry out the objectives of the MMPA and ESA.

CONCLUSION

Plaintiffs are entitled to injunctive and declaratory relief on their claims under the CZMA. As to the remaining claims raised in the Complaint, defendants are entitled to judgment as a matter of law.

This Opinion shall constitute the Court's Findings of Fact and Conclusions of Law.

ORDER AND SUMMARY JUDGMENT

The parties' cross-motions for summary judgment, pursuant to Fed.R.Civ.P. 56, and defendant-intervenors' motion for summary judgment, or, in the alternative, motion to dismiss the complaints of Natural Resources Defense Council, *et al.*, and of the County of Humboldt, *et al.*, pursuant to Fed.R.Civ.P. 12(b)(6), came on for hearing before the Honorable Mariana R. Pfaelzer on July 10, 1981. All parties appeared by and through their respective counsel of record. Having reviewed and considered the administrative record and the memoranda, affidavits, and exhibits filed by the parties, and having heard and considered the oral arguments of counsel, and having taken the matter under submission, the Court has incorporated its Findings of Fact and Conclusions of Law in the Opinion filed herewith. Accordingly,

IT IS ORDERED, ADJUDGED AND DECREED that:

1. Plaintiffs' Motion for Summary Judgment in CV 81-2080, with respect to the claim arising under the Coastal Zone Management Act, 16 U.S.C. §§ 1451 *et seq.*, is granted. Defendants' Motion for Summary Judgment with respect to plaintiffs' claim arising under the Coastal Zone Management Act is denied.

2. Defendants' decision to lease Tracts 129 to 142, 144 to 146, 148 to 155 and 158 to 161 in the northern portion of the Santa Maria Basin for oil and gas development was made in violation of the Coastal Zone Management Act.

3. Any bids received for the tracts at issue are declared null and void and the monies posted shall be returned to the bidders.

4. Any oil and gas leases for any of the tracts at issue herein awarded as part of Lease Sale No. 53 are declared null and void.

5. Defendants and defendant-intervenors, their officers, agents, employees, representatives, and all persons acting in concert with them, are hereby enjoined from awarding, approving or taking any action or allowing others to take any action pursuant to any leases for any of the tracts at issue, until such time as defendants comply with the requirements of the Coastal Zone Management Act by conducting a consistency determination on the tracts at issue and by conducting all activities on these tracts in a manner consistent with California's Coastal Management Plan.

6. Defendants' Motion for Summary Judgment in CV 81-2080 with respect to plaintiffs' claims arising under the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331 *et seq.*, the National Environmental Protection Act, 42 U.S.C. §§ 4321 *et seq.*, the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*, and the Marine Mammal Protection Act, 16 U.S.C. §§ 1361 *et seq.*, is granted. Plaintiffs' Motion for Summary Judgment in CV 81-2080 with respect to the claims arising under these statutes is denied.

7. Defendant-intervenors' Motion to Dismiss Plaintiffs, Natural Resources Defense Council, *et al.*, in CV 81-2081 pursuant to Fed.R.Civ.P. 12(b)(6) is granted.

8. Defendant-intervenors' Motion to Dismiss Plaintiff-intervenors, County of Humboldt, *et al.*, in CV 81-2080 pursuant to Fed.R.Civ.P. 12(b)(6) is denied.

9. Each party shall bear its own costs.

10. Judgment is hereby entered.

The Court shall retain continuing jurisdiction over this case to ensure compliance with this Order.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**Nos. 81-5699, 81-5700,
81-5701, 81,5811,
81-5812, 81-5813,
81-5814, 81-5815,
81-5720, 81-5822.**

DC CV 81-2080, 81-2081 MRP

THE STATE OF CALIFORNIA, acting by and through GOVERNOR EDMUND G. BROWN, JR., *et al.*,
Plaintiffs-Appellees,

v.

JAMES G. WATT, as Secretary of the Interior, *et al.*,
Defendants,

WESTERN OIL AND GAS ASSOCIATION, a regional trade association, *et al.*,
Defendants-in-Intervention/Appellants.

APPEAL from the United States District Court for the District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed in part, reversed in part, vacated in part, and stayed in part.

Filed and entered August 12, 1982

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 81-5699, 81-5700,
81-5701, 81-5720,
81-5811, 81-5812,
81-5813, 81-5814,
81-5815, 81-5822.

THE STATE OF CALIFORNIA, *et al.*,
Appellees/Cross-Appellants,

v.

JAMES G. WATT, *et al.*,
Appellants/Cross-Appellees.

ORDER

Before: SNEED, TANG, and PREGERSON, Circuit Judges

The panel as constituted in the above case has voted to deny the petitions for rehearing and to reject the suggestions for rehearing en banc.

The full court has been advised of the suggestions for en banc rehearing, and no judge of the court has requested a vote on the suggestions. Fed. R. App. P. 35(b).

The petitions for rehearing are denied and the suggestions for rehearing en banc are rejected.

FILED
Nov. 10, 1982
Phillip B. Winberry
Clerk, U.S. Court of Appeals